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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1945

No. 517

D. A. SCHULTE, INC., PETITIONER,

vs.

SALVATORE GANGI, SUING ON BEHALF OF HIMSELF AND OTHER EMPLOYEES SIMILARLY SITUATED

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED OCTOBER 17, 1945.

CERTIORARI GRANTED NOVEMBER 19, 1945.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No.

D. A. SCHULTE, INC., PETITIONER,

vs.

SALVATORE GANGI, ETC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

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IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

SALVATORE GANGI, suing in behalf of himself and other employees and former employees of defendant similarly situated, Plaintiff,

against

D. A. SCHULTE, INC., Defendant

STATEMENT UNDER RULE XIII

This action was commenced in the District Court of the United States for the Southern District of New York by the filing of a complaint on April 6, 1943 and by the service of a summons and complaint on the defendant on April 7, 1943.

Defendant's answer was served and filed on May 14, 1944.

That by stipulation, the complaint was amended to include Joseph Levitt as a party plaintiff.

That by stipulation, it was agreed that the plaintiff and the other enumerated employees were to be limited in the event of recovery to liquidated damages in certain stipulated sums.

The action came on trial before the Honorable Simon H. Rifkind without a jury on the 14, 15, 16, 17, and 20th days of December 1943 and resulted in a decision.

[fol. 3] The Court denied plaintiff's motion to dismiss the defenses of Accord and Satisfaction and Release and granted plaintiff's motion to dismiss all the other affirmative defenses of counterclaim.

Judgment dismissing the complaint and in the amount of $47.50 costs was entered on January 20, 1944.

Plaintiff filed notice of appeal to the United States Circuit Court of Appeals for the Second Circuit on April 11, 1944.

Plaintiff's attorney is Isidore Entes, Esq., 521 Fifth Avenue, Borough of Manhattan, City of New York.

Defendant's attorneys are Ernst, Gale, Bernays, Falk & Eisner, Esqs., 40 Wall St., Borough of Manhattan, City of New York.

There has been no change of parties other than the addition of Joseph Levitt as party plaintiff or attorneys since the commencement of the action.

IN UNITED STATES DISTRICT COURT

SUMMONS—April 5, 1943

To the Above Named Defendant:

You Are Hereby Summoned and required to serve upon Isidore Entes, plaintiff's attorney, whose address is 521 Fifth Avenue, Borough of Manhattan, New York City, an answer to the complaint which is herewith served upon you, within 20 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

George J. H. Follmer, Clerk of Court.

Dated: April 5th, 1943.

[fol. 4] IN UNITED STATES DISTRICT COURT

COMPLAINT

1. Plaintiff brings this action for and in behalf of himself and in behalf of other employees and former employees of defendant similarly situated, to recover unpaid overtime compensation and an additional equal amount as liquidated damages pursuant to Section 16(b) of the Fair Labor Standards Act of 1938 (Pub. No. 718, 75th Cong.; 52 Stat. 1060), hereinafter referred to as the Act. Plaintiff has been designated as agent to bring this action for and in behalf of the following employees and former employees similarly situated:

Arthur Weiss	Salvatore Schiovone	Murray Goff
Anthony Pascale	Otto Tropani	Eugene Messinia
Ernest Ciruzzo	Ben Royback	Arthur Steele
James Gangi	Charles Madonia	William Johnson
Albert Dodwell	Myron Menkin	Michael Solicto
Jacob Greenberg	Fred Knapp	

2. Jurisdiction is conferred upon this Court by Section 41(8), 28 U. S. C. A. (Judicial Code) 24, giving the District Court original jurisdiction "of all suits" and proceedings arising under any law regulating commerce," without regard to the citizenship of the parties or the sum or value in controversy, and by Section 16(b) of the Act. The act has been in effect since October 24, 1938.

3. At all times herein mentioned defendant has been a corporation duly organized under and existing by virtue of the laws of the State of New York, having its principal place of business at 384 Broadway, Borough of Manhattan, City and State of New York, within the jurisdiction of this Court.

4. At all times hereinafter mentioned, the defendant managed, operated and controlled a twenty-three (23) story [fol. 5] loft building located at 571-583 Eighth Avenue, Borough of Manhattan, City and State of New York.

5. At all times hereinafter mentioned spaces in premises 571-583 Eighth Avenue has been leased by defendant to and occupied by approximately sixty-three (63) tenants of which approximately fifty-two (52) have been engaged in the building in the production sale and distribution of ladies garments and approximately nine (9) have been engaged in the building in the purchase, sale and distribution of buttons, silks, rayons, and other materials and supplies at wholesale to manufacturers, wholesalers and contractors in the ladies' garment industry.

6. At all times herein mentioned substantially all of the materials from which goods have been produced in the building of tenants engaged in the production, sale and distribution of ladies' garments have been purchased, transported and received in interstate commerce from points in various states other than the State of New York, and substantially all of the goods produced by such tenants have been produced for interstate commerce and have been, subsequent to the work performed upon them in the building, sold, shipped, transported, distributed and delivered in interstate commerce from the building to points in various states other than the State of New York. At all times herein mentioned substantial quantities of silks, rayons, and other materials and supplies distributed in the building by tenants engaged in the sale and distribution at whole-

sale of such materials have been purchased, transported and received in interstate commerce from points in various states other than the state of New York, and substantial [fol. 6] quantities of such goods have been sold, shipped, transported, distributed and delivered in interstate commerce in and from the building to points in various states other than the State of New York. With few exceptions, substantiall- all of the tenants in the building have thus been regularly and continuously engaged there in trade, commerce and transportation between the several states of the United States and in the production of goods for distribution among the several states of the United States.

7. At all times herein mentioned a substantial number of tenants in the building have been regularly and continuously engaged there in the use of the mails, telephone, telegraph and other instrumentalities of interstate commerce to communicate between offices in the building and various points outside of the State of New York. A substantial number of tenants have thus regularly and continuously engaged in the building in interstate transmission and communication.

8. Since October 24, 1938, defendant has employed a total of approximately twenty-six (26) and an average of approximately nineteen (19) employees including plaintiff as building maintenance and operating employees, in such capacities as elevator operators, starters, watchmen, engineers, firemen, mechanics, electricians, porters and handymen, in the maintenance and operation of the 571-583 Eighth Avenue building, and of the facilities within the building. These employees have at all times performed the customary duties of persons charged with effective maintenance of a loft and manufacturing building, including the furnishing of heat and hot water; the keeping of elevator, radiator, [fol. 7] water and fire sprinkler systems in repair; the maintenance of electric light and power systems and appliances; the operation of elevators carrying tenants and employees, customers and clients of tenants, and other passengers, as well as raw materials and other goods coming to and finishing garments and other products going from tenants' quarters and property from theft, fire and other damage; repair of hallways, stairways and other common parts of the building; and the keeping of the building and tenants' quarters in a clean and habitable condition.

9. In performing their duties the said employees, including plaintiff, have been engaged in operations closely, immediately and essentially related to interstate trade, commerce, transportation, transmission and communication carried on in the building by the various tenants, and in occupations and processes necessary to the preparation, handling and production for interstate commerce of various goods, articles and materials and commodities by the tenants in the building.

10. Between October 24, 1938 and the present date defendant employed plaintiff, Salvatore Gangi, as an elevator operator engaged in interstate commerce and in the production of goods for interstate commerce, and during the period between October 24, 1938 and the present date defendants have employed various other building maintenance and operating employees similarly situated to plaintiff in interstate commerce and in the production of goods for interstate commerce, for workweeks longer than the applicable maximum number of weeks prevailing under Section 7 of the Act (44 hours per week between October [fol. 8] 24, 1938 and October 24, 1939; 42 hours per week between October 24, 1939 and October 24, 1940; and 40 hours per week subsequent to October 24, 1940) and defendant has failed and refused to compensate plaintiff and such other employees for such employment in excess of the applicable maximum in such workweeks at rates not less than one and one half times the regular rates at which they have been employed. The employment of the plaintiff and other employees similarly situated for workweeks in excess of the applicable maximum prevailing under Section 7 of the Act without compensating them for such excess at rates not less than one and one-half times the regular rates at which they have been employed. The employment of the plaintiff and other employees similarly situated for workweeks in excess of the applicable maximum prevailing under Section 7 of the Act without compensating them for such excess rates not less than one and one-half times the regular rates at which they have been employed was in violation of Section 7 of the Act.

11. During the period from October 24, 1938 to February 3, 1942 defendant employed Salvatore Gangi for the number of hours in each week, and for the number of overtime hours in excess of the maximum standard prevailing

under Section 7 of the Act, shown in Schedule "A" annexed hereto; and during the same period defendant paid Salvatore Gangi in each week the wages shown in Schedule "A" and compensated him at the hourly rate of pay there shown; accordingly, Salvatore Gangi was underpaid in an amount as shown for each week in Schedule "A," or in the total sum of $306.30.

12. That on or about September 24, 1942, the defendant [fol. 9] paid the plaintiff Salvatore Gangi the sum of Two hundred fifty-six ($256.36) Dollars and 36/100 towards the payment of overtime and liquidated damages due plaintiff under the Act.

13. By reason of the premises, the plaintiff, Salvatore Gangi has been damaged in the sum of $306.30 together with an additional equal amount as liquidated damages leaving a balance of $356.24.

Wherefore, plaintiff, Salvatore Gangi, prays that judgment be awarded him in the sum of $306.30 for unpaid overtime compensation, and for an additional equal amount as liquidated damages or a total of $612.60, less the sum of $256.36 leaving a balance of $356.24, and plaintiff further prays that judgment be awarded in favor of all other employees similarly situated in amounts equal to the difference between the amounts such employees have respectively received and the amounts such employees should respectively have received if they had been compensated in accordance with the requirements of Section 7 of the Act, together with an equal additional amount, or a total of approximately $6,000; plaintiff further prays that the Court allow the costs of this action together with a reasonable attorney's fee to be paid by defendant in accordance with Section 16(b) of the Act.

Isidore Entes, Attorney for Plaintiff, Office & P. O. Address, 521 Fifth Avenue, New York City.

[fol. 10]

SCHEDULE "A" TO COMPLAINT

Weekly Period	Begins	Ends	Hours Worked Weekly	Excess Hours	Wages	Hourly Rate	Overtime Pay Due
1 to 16	10/24/38	2/ 3/39	48	4x15 60	24.75	52	60x .26 = $15.60
16 to 53	2/ 3/39	10/23/39	48	1x37 148	26.31	55	148x .275 = 40.70
53 to 94	10/24/39	8/ 3/40	48	5x41 246	26.31	55	246x .275 = 67.65
84 to 105	8/ 3/40	10/23/40	48	6x11 66	28.24	59	66x .295 = 19.47
105 to 174	10/24/40	2/ 3/42	48	8x69 552	28.24	49	552x .295 = 162.88

Total Pay For Overtime: $306.30

[fol. 11] IN UNITED STATES DISTRICT COURT

ANSWER

Defendant, D. A. Schulte, Inc., answering plaintiff's complaint, by its attorneys, Ernst, Gale, Bernays, Falk & Eisner:

1. States that it is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph "1" of the complaint.

2. Denies each and every allegation contained in paragraphs "5," "6" and "7" of the complaint, except that defendant admits that approximately 69 tenants occupied space in premises 571-583 Eighth Avenue, Borough of Manhattan, City of New York.

3. Denies each and every allegation contained in paragraphs "8" and "9" of the complaint, except that defendant admits that plaintiff Salvatore Gangi, and others, were employed as building service employees in the building located at 571-583 Eighth Avenue, Borough of Manhattan, City of New York.

4. Denies each and every allegation contained in paragraphs "10" and "11" of the complaint, except defendant admits that plaintiff Salvatore Gangi, was employed as an elevator operator during the period between October 24, 1938 and the date of the complaint, and that others were employed as building service employees on the terms and conditions and for the periods hereinafter specifically set forth and admitted.

5. Denies each and every allegation contained in paragraphs "12" and "13" of the complaint except defendant admits that on or about September 24, 1942, it paid [fol. 12] the plaintiff, Salvatore Gangi, the sum of Two Hundred Fifty-Six and 36/100 ($256.36) Dollars.

For Its Defenses Defendant Alleges:

First Defense:

6. That the complaint fails to state a claim against defendant upon which relief can be granted to the plaintiff, Salvatore Gangi, and that the complaint fails to state a claim or claims against the defendant upon which relief can

be granted in behalf of any employees similarly situated to said plaintiff Salvatore Gangi, within the purview of The Fair Labor Standard Act of 1938 (Title 29 U. S. C. A., Sec. 201-219), hereinafter referred to as the "Act."

Second Defense:

7. That prior to the commencement of this action and on or about the 24th day of September, 1942, and pursuant to an agreement of settlement made between them, defendant gave to plaintiff Salvatore Gangi, and plaintiff Salvatore Gangi accepted and received from the defendant, the sum of Two Hundred and Fifty-Six and 36/100 ($256.36) Dollars, as in full satisfaction and discharge of all the liabilities and claims alleged in the complaint and that at the time of such payment and accord and satisfaction, as aforesaid, defendant in good faith disputed and denied its liability to plaintiff with respect to the matters alleged in the complaint and as to the amount due from defendant to plaintiff.

Third Defense:

8. That prior to the commencement of this action and on or about the 24th day of September, 1942, and pursuant to an agreement of settlement made between them, defend-
[fol. 13] ant gave to the persons named in paragraph "1" of the complaint and who are hereinafter named, the sums set opposite their respective names and the said persons accepted and received from the defendant the said sums as in full satisfaction and discharge of all liabilities and claims alleged in the complaint and that at the time of such payments and accord and satisfaction, as aforesaid, defendant in good faith disputed and denied its liability to the said persons with respect to the matters alleged in the complaint and as to the amounts due from defendant to said persons:

Name	*Amount Paid*
Arthur Weiss	250.20
Anthony Pascale	271.81
Ernest Ciruzzo	255.81
James Gangi	225.97
Albert Dodwell	203.67
Jacob Greenberg	198.15
Salvatore Schiovone	222.29

Name	*Amount Paid*
Otto Tropani	207.72
Ben Royback	210.77
Charles Madonia	96.88
Myron Menkin	250.41
Fred Knapp	72.98
Murray Goff	140.94
Eugene Messinia	195.61
Arthur Steele	246.63
William Johnson	249.77
Miacheal Solicito	74.39

Fourth Defense:

9. That on or about the 24th day of September, 1942, the plaintiff Salvatore Gangi, for good and valuable consideration duly made and delivered to the defendant a release in writing under seal, wherein and whereby the said plaintiff duly released to the defendant the alleged cause of action stated in the complaint and duly released the defendant of and from any other or further obligations which the [fol. 14] defendant owed or might owe to plaintiff under the said Act. A true copy of said release is hereto annexed and marked Exhibit "A."

Fifth Defense:

10. That on or about the 24th day of September, 1942, each and every of the persons named in paragraph "1" of the complaint and paragraph "7" hereof, for good and valuable consideration duly made and delivered to the defendant releases in writing under seal, wherein and whereby the said persons duly released to the defendant the alleged causes of action stated in the complaint on their behalf and duly released the defendant of and from any other or further obligations which the defendant owed or might owe to plaintiff under the said Act. True copies of each of the said releases are annexed hereto and marked Exhibits "B" to "R" inclusive.

Sixth Defense:

11. That throughout the entire period of time covered by the complaint when the plaintiff and the other persons named in paragraph "1" of the complaint, were employed

as building service employees at the premises 571-583 Eighth Avenue, defendant was a party to certain master collective bargaining agreements between the Midtown Realty Owners Association, Inc., Penn Zone Association, Inc. and the Greater New York Council of the Building Service Employees International Union governing the terms and conditions of employment in said building, to wit, (1) the so-called Extended Mahoney Agreement dated February 18, 1936, as amended by the so-called Alger Agreement dated May 21, 1937, and the arbitration award made thereunder and thereby a part of said agreement, known [fol. 15] as the Alger Award, effective February 1, 1938, and (2) the so-called McGrady Agreement, between the said Midtown Realty Owners Association, Inc. and the Penn Zone Association, Inc. and Locals 32B, 32J and 164 of the Building Service Employees International Union, effective February 4, 1939, together with the so-called Wolff Award, effective August 4, 1940, made a part of said latter agreement.

12. That throughout the period set forth in the complaint the defendant and the plaintiff and the other persons named in paragraph "1" of the complaint were mutually bound by all the provisions of said collective bargaining agreements by virtue of the membership of the plaintiff and said other persons in the said Locals of said Union, or by their individual acceptance of said agreements and by the continuance of defendant as a party to said collective agreements.

13. That said collective bargaining agreements were entered into and carried out by the parties thereto in harmony with the spirit and purpose of the State and National Labor Relations Acts and were intended by the defendant and the plaintiff and said other persons named in paragraph "1" of the complaint to constitute a complete agreement upon the terms and conditions of their employment relationship and to bring such relationship into conformity with all applicable State and Federal laws.

14. That it was mutually agreed that the regular or standard hours of employment of the employees in the said [fol. 16] building at 571-583 Eighth Avenue, would be limited to a specified number per week and that said employees would be paid therefor a specified regular weekly wage

and that all hours in excess of such standard work week would be paid for at the rate of time and a half; the agreed standard work week and the actual work week of the plaintiff as well as his weekly wage therefor being as follows, for the specified periods of his employment during the time mentioned in the complaint:

October 24, 1938 to February 2, 1939—$24.75 per week for a forty-eight hour week.

February 3, 1939 to August 1, 1940—$25.75 per week for a forty-seven hour week.

August 2, 1940 to February 5, 1942—$26.52 per week for a forty-six hour week.

15. That throughout the period of their employment, plaintiff and the other employees at the said building and premises 571-583 Eighth Avenue, had been paid in full and in strict accordance with said collective bargaining agreements.

16. That at no time prior to June 1, 1942 did the plaintiff or any other employee of the defendant ever make any claim for additional wages under the said Act and in full and complete reliance upon the acceptance by its employees of said collective bargaining agreements and upon the failure of plaintiff and the said other persons named in paragraph "1" of the complaint, the defendant from time to time calculated its probable labor and other costs [fol. 17] to be incurred in the operation and maintenance of the said building at 571-583 Eighth Avenue, and upon the basis of such costs and estimates determined the lease rentals which it charged the tenants of said building in order to meet the costs of such operation and maintenance.

17. That before the assertion of a claim by the plaintiff or any of the said other persons named in paragraph "1" of the complaint, under the said Act, and acting in full reliance on the course of conduct by plaintiff and said other persons, the defendant substantially and irrevocably changed its position in that it is now unable to retroactively to adjust its lease rentals and costs in the operation and maintenance of the said building to meet the claims of the plaintiff or of said other persons for the additional compensation claimed in the complaint and as a result the defendant would suffer undue hardship and gross inequity if

plaintiff and the said other persons were permitted to prevail in this action.

18. That by virtue of the foregoing facts and circumstances plaintiff is and the said other persons are and should be estopped from prosecuting the claims set forth in the complaint herein.

Seventh Defense and also as a Counterclaim:

19. Defendant here repeats all the allegations contained in paragraphs "11" to "17" inclusive hereof.

[fol. 18] 20. That said collective bargaining agreements were entered into and carried out according to their terms by the defendant and the plaintiff and the other persons named in paragraph "1" of the complaint, during the period covered by the complaint in the mutual and bona fide belief that neither the plaintiff nor any of the said employees were engaged in commerce, or in the production of goods for commerce within the meaning of the said Act, and that therefore the said Act had no application to their employment relationship.

21. That it now appears as a result of the decision of the Supreme Court of the United States in the case of Kirschbaum v. Walling, decided June 1, 1942, that in entering and carrying out said collective bargaining agreements according to their terms, the defendant and the plaintiff and said other persons named in paragraph "1" of the complaint acted under a mutual mistake of fact and law as to the non-application of the Act to their employment relationship.

22. That the true intention of defendant and plaintiff and said other persons named in paragraph "1" of the complaint in entering into and carrying out the said collective bargaining agreements was that such agreements should be in complete conformity with all laws applicable to their employment relationship and that the employees should not be paid more than the stipulated weekly wages for their standard work week as above set forth and alleged: [fol. 19] that the belated claims of the plaintiff and said other persons named in paragraph "1" of the complaint for additional compensation are contrary to the true intention of the parties as evidenced by their said collective agreements and under all the circumstances of this case are

grossly inequitable and unconscionable; that but for said mutual mistake in fact and law as to the application of the Act to their employment relationship, the defendant and plaintiff and said other persons would have expressly provided and agreed in said collective bargaining agreements for regular hourly rates or a formula for determining such hourly rates as, on the basis of straight time for hours worked each week plus half times for hours worked in excess of those stipulated in Section 7 (a) of the Act, would have yielded weekly wages equal to but not exceeding those agreed to be paid under said collective bargaining agreements; and as evidence of such true intention plaintiff respectfully refers to the certain master collective bargaining agreement known as the Meyer Agreement, dated February 17, 1942, effective February 4, 1942, between the Midtown Realty Owners Association, Inc., the Penn Zone Association, Inc., and Locals 32B and 32J of the Building Service Employees International Union, under which agreement the defendant and the plaintiff and the said other persons named in paragraph "1" of the complaint are mutually bound by virtue of the membership of the plaintiff, and said other persons in the said Locals of the said Union, or by their individual acceptances of said agreements and [fol. 20] by the continuance of defendant as a party to said collective agreements and under which agreement it was expressly provided that:

> "The hourly rates for those regularly employed more than forty (40) hours per week shall be determined by dividing their weekly earnings by the number of hours employes plus one-half the number of hours actually employed in excess of forty (40) hours."

Wherefore, defendant respectfully prays that in accordance with the true intention of the parties and with good conscience and equity the Court reform said collective bargaining agreements between the defendant, plaintiff and said other persons named in paragraph "1" of the complaint, by including therein specific regular hourly rates or a formula for determining such rates so that the total weekly compensation found to be due to plaintiff and said other persons for the period of their employment alleged in the complaint herein, including compensation for overtime hours in accordance with Section 7(a) of the Act, shall equal but not exceed the total weekly compensa-

tion agreed to be paid and actually paid the plaintiff and the said other persons under the said collective agreements.

Eighth Defense:

23. Defendant repeats all the allegations contained in paragraphs numbered "11" to "15" inclusive herein.

24. That no regular hourly rate was ever expressly provided in the said collective bargaining agreements between the defendant and the plaintiff and said other per- [fol. 21] sons named in paragraph "1" of the complaint.

25. That consistent with the true intention of the parties that said collective bargaining agreements should be in complete conformity with law and that the plaintiff and said other persons should receive the specified regular wage for a regular or standard work weeks as above set forth, the regular hourly rates impliedly agreed upon between the defendant and its employees were such rates as on the basis of straight time for hours worked each week plus half time for hours worked in excess of those stipulated in Section 7(a) of the Act, would yield weekly wages equal to but not exceeding those agreed to be paid and actually paid under said collective bargaining agreements.

26. That plaintiff and the other persons named in paragraph "1" of the complaint have been paid in full under the Act.

Wherefore, defendant prays that the complaint herein be dismissed with costs.

Ernst, Gale, Bernays, Falk & Eisner, by Jerome A. Eisner, a Partner, Attorneys for Defendant, Office & P. O. Address, 40 Wall Street, Borough of Manhattan, City of New York.

[fols. 22-30] EXHIBIT "A" TO ANSWER

D. A. Schulte, Inc.

(A. Schulte)

Imported, Key West and Domestic Cigars

Executive Offices 384-386 Broadway, New York

The undersigned, an employee of D. A. Schulte, Inc. in premises 575 Eighth Avenue, New York City, does hereby acknowledge receipt of the sum of $256.36 as payment in

full of all sums, if any, which may be due to the undersigned by said D. A. Schulte, Inc. by reason of the Federal Wage & Hour Act and the undersigned does hereby release said D. A. Schulte, Inc. of and from any other or further obligations in connection therewith.

Dated, New York, N. Y. Sept. 24, 1942.

Salvatore Gangi, (L. S.)

Witness: H. J. Ryan.

(By stipulation, Exhibits 'B' to 'S' inclusive, are not printed, but each of them is the same as Exhibit 'A' except for the name and amount appearing thereon.)

[fol. 31] In United States District Court

Stipulation Adding Party Plaintiff, Etc.

It Is Hereby Stipulated and Agreed by and between the attorneys for the respective parties hereto:

1. That the complaint in the above entitled action be and the same hereby is amended so as to include Joseph Levitt as a party plaintiff in the above entitled action.

2. That paragraph "8" of the defendant's answer herein be amended so as to include among the persons named therein, together with the amounts paid to them, the following:

Name	Amount Paid
Joseph Levitt	252.40

3. That paragraph "10" of the defendant's answer herein be amended so as to substitute the number "8" in place of the number "7" in the third line of said paragraph; that the release annexed hereto marked "S" be deemed annexed to said answer and that the letter "S" be substituted in place and stead of the letter "R" in the last line of said paragraph "10" of the answer.

4. That the defendant has delivered to the undersigned, attorney for the plaintiff, the data respecting the employment of Joseph Levitt, an elevator operator at 571-581 Eighth Avenue, New York City, during the period 1938 to 1942 showing the number of hours worked per week by him

during said period, the salary paid to him during the said period, etc. and the provisions of the stipulation signed by the undersigned attorney for the plaintiff dated June [fol. 32] 25, 1943, shall apply in the case of Joseph Levitt as fully and effectually as though the said data had been delivered by the defendant at the time of the execution by the attorney for the plaintiff of the said stipulation.

Dated, New York, July 19, 1943.

Isidore Entes, Attorney for Plaintiff; Ernst, Gale, Bernays, Falk & Eisner, Attorneys for Defendant.

IN UNITED STATES DISTRICT COURT

STIPULATION FIXING AMOUNT OF RECOVERY OF PLAINTIFF, ETC.

It Is Hereby Stipulated and Agreed by and between the attorneys for the respective parties hereto that the plaintiffs in the above entitled action whose names are listed below were employed by the defendant as building maintenance and operating employees in defendant's building known as 571-583 Seventh Avenue, during the period of October 24, 1938 to April 20, 1942 and that there overtime compensation for such periods as computed under the Fair Labor Standards Act of 1938 was as alleged in the second and third defenses of defendant's answer, and

It Is Further Stipulated and Agreed that in the event of recovery of liquidated damages by the below stated [fol. 33] plaintiffs and employees of defendant that the respective amounts of said liquidated damages shall be in the sums equivalent to those alleged in said second and third defenses, to wit:

	Salvatore Gangi	256.36
	Arthur Weiss	250.20
	Anthony Pascale	271.81
	Ernest Ciruzzo	255.81
	James Gangi	225.97
	Albert Dodwell	203.67
	Jacob Greenberg	198.15
	Salvatore Schiovone	222.29
	Otto Tropani	207.72
E, G, B, F & E	Joseph Levitt	252.40
	Ben Royback	210.77

Charles Madonia	96.88
Myron Menkin	250.41
Fred Knapp	72.98
Murray Goff	140.94
Eugene Messinia	195.61
Arthur Steele	246.63
William Johnson	249.77
Miacheal Solicito	74.39

Dated, New York, November 29, 1943.

Isidore Entes, Attorney for Plaintiffs; Ernst, Gale, Bernays, Falk & Eisner, Attorneys for Defendant.

[fol. 34] In United States District Court, Southern District of New York

Civ. 21-49

Salvatore Gangi Suing in Behalf of Himself and Other Employees and Former Employees of Defendant Similarly Situated, Plaintiff,

vs.

S. A. Schulte, Inc., Defendant

Statement of Evidence

Before: Hon. Simon H. Rifkind, District Judge.

New York, December 14, 1943;
2.15 o'clock p. m.

Appearances:

Isidore Entes, Esq., and Abraham E. Jacobs, Esq., Attorneys for Plaintiff.

Ernst, Gale, Bernays, Falk & Eisner, Esqrs., Attorneys for Defendant; Edwin A. Falk, Esq., and Abraham Friedman, Esq., of Counsel.

[fol. 35] The Court: You may proceed.

Mr. Entes: Your Honor please, I am now submitting the marked complaint, stipulation amending the complaint, and stipulating that Joseph Levitt is a party plaintiff to this

action, and a stipulation agreeing that all the plaintiffs enumerated in the complaint and the stipulation are building and maintenance operating employees of premises 571-583 Eighth Avenue, Borough of Manhattan, City of New York; and further stipulating that in the event of recovery of damages of the above-named plaintiffs, that the amount of recovery will be limited to the moneys already collected as alleged in the second and third defenses, and more fully listed in said stipulation—may I correct myself. The amount of moneys recovered will be in the sums of money equivalent to that already collected.

The Court: Well, let us not get ourselves confused. You have the amounts specified in this stipulation?

Mr. Entes: Yes.

The Court: All right. Then the amount of recovery, if there is to be a recovery, will be the amount specified in this stipulation?

Mr. Entes: Yes.

I now submit to the Court a trial memorandum, a copy [fol. 36] of which has been served upon the attorney for the defendant.

The Court: Very well.

MOTION TO STRIKE

Mr. Entes: At this time the attorney for the plaintiff's moves that the several affirmative defenses and counterclaim as interposed in the defendant's answer be stricken from the answer; and plaintiff in its motion states that the several affirmative defenses and counterclaims can be broken up into the following: The first defense as alleged in paragraph 6 states that the complaint is insufficient as a matter of law. The second defense, as alleged in paragraph 7, states an accord and satisfaction as to Salvatore Gangi. The third defense, as alleged in paragraph 8 of defendant's answer, alleges an accord and satisfaction as to all of the other enumerated employees. The fourth defense, paragraph 9, alleges a release of Salvatore Gangi for good and valuable consideration, and it is marked Exhibit A in defendant's answer. The fifth defense, paragraph 10, alleges a release of all the other enumerated employees for good and valuable consideration, and the exhibits are marked B to R. By stipulation——

The Court: Does that conclude all the defenses?

Mr. Entes: No. There is one more. By the stipulation there is also alleged a release of Joseph Levitt for good and [fol. 37] valuable consideration, and that is marked Exhibit S.

Now, the sixth defense in paragraph 11 to 19 is an allegation of estoppel. The seventh defense, which is also a counterclaim, allegedly a reformation of the union contract because of a mutual mistake of law; and the eighth defense, which is paragraph 23 to 25, the last defense, alleges payment.

The Court: Do you want to be heard on the motion? Do you want to consent to any of these?

Mr. Falk: No, sir; we won't consent. We are going to press the affirmative defenses except and an accord and satisfaction and the release at this time, because this Court has ruled in the first instance on some of those others.

The Court: Well, with respect to reformation——

Mr. Falk: We want to preserve our rights.

The Court: You want to preserve. But I would like to know whether you think that you can prove what the contract would have been had there been no mistake of fact and law. Is reformation pleaded as a counterclaim?

Mr. Falk: Reformation is pleaded as a counterclaim. There has been no reply as far as that circumstance.

[fol. 38] The Court: Do you want to stipulate about a reply?

Mr. Entes: Your Honor, it is also an affirmative defense, so I did not reply. I realize technically they are entitled to a reply, but I think we will stipulate that the reply would consist of a general denial.

The Court: Is that satisfactory to you, Mr. Falk?

Mr. Falk: Yes, that is satisfactory.

The Court: I presume you have pleaded the usual mistakes of fact in relation to the negotiation of the union agreement?

Mr. Falk: Yes.

Mr. Entes: Yes.

The Court: Was the defendant here a member of the associations who participated in that negotiation?

Mr. Falk: Yes.

The Court: Well, in Berry v. Irving Place the same defense was pleaded. I sustained the defense pleaded but I dismissed the defense on the proof on the ground that the

defendant had not succeeded in establishing what the contract would have been had the intention of the parties been truly represented. I pointed out in that opinion that the last preceding union agreement, the 1937 union agreement extended to about February of 1939, but with respect to the 1937 union agreement no allegation of mistake could [fol. 39] have been made and was not made because at that time the law had not yet been enacted and has not yet been introduced. So that on any theory the employees would have been entitled to receive the enlarged compensation during the period from October 24, 1938, until February 1939 when the negotiations for a new labor agreement were commenced. I said that no one had introduced in evidence, and in the nature of things no evidence could be introduced which would show what form those negotiations might have taken had at that time the wage level been at a higher level than it actually was. I suggested hypothetically that maybe no strike would have been called. I suggested hypothetically that perhaps the union starting from a higher level might have insisted on higher rates, or there may have been simple renewal of the old agreement. In any event I held not in law but on the fact that defense of reformation had not been established because the contract which it was the intention of the parties to enter into had not been proved, and that was an essential element, of course, for any action of reformation.

Now, if you think that you have proof of the kind indicated I will let you prove it. But if you think that it is as hopeless as I now indicate it, I wish you would so tell me, [fol. 40] and then I will pass on it as a matter of law.

Mr. Falk: Well, I would like to reserve my answer on that until the conclusion of the plaintiff's case.

The Court: Very well.

You haven't any real ground for challenging the sufficiency of the complaint, have you?

Mr. Falk: No, sir.

The Court: Then we will grant the motion to strike the first defense.

Mr. Falk: Exception. I assume I may have an exception?

The Court: Yes.

Now, you say you want to press the accord and satisfaction and the release?

Mr. Falk: Yes.

The Court: So I will reserve decision on the second, third, fourth and fifth defenses. The sixth is an estoppel. Do you intend to press that?

Mr. Falk: No, sir, but I would like to reserve our rights on that.

The Court: Well, I have heretofore dismissed defenses of that character.

Mr. Falk: I would like an exception.

[fol. 41] The Court: I will grant the motion to strike the sixth defense. The seventh defense I will reserve decision on for the reason I have just indicated. The eighth defense I will grant, that is, grant the motion to strike.

Mr. Falk: Exception.

The Court: Very well. You may now proceed.

Mr. Entes: May I proceed with the motion?

The Court: No, you may proceed with your proof.

[fol. 42] SALVATORE GANGI, etc.

vs.

D. A. SCHULTE, INC.

(December 14, 1943)

Mr. Entes: Salvatore Gangi, please take the stand.

SALVATORE GANGI, called as a witness in his own behalf, being duly sworn, testified as follows:

Direct examination.

By Mr. Entes:

Q. Mr. Gangi, were you an employee of D. A. Schulte, Incorporated, at 571-583 Eighth Avenue from the period of October 24, 1938 to February 5, 1942?

A. Yes, sir.

The Court: Does that date apply to all the employees?

Mr. Entes: Yes.

The Court: From the date of the act to the date of the Meyer agreement.

Q. Mr. Gangi, were you familiar with the type of building you were employed in?

A. Yes. I was employed in the loft building.

Q. How many stories?

A. 24 stories.

Q. And how many elevators in the building?

A. Four front cars and three freight.

Q. And are the fr-ight cars busy all day long?

[fol. 43] A. No, we use the three in the rush.

Q. And did you speak to Arthur Weiss, Anthony Pascale, Ernest Ciruzzo, James Gangi, Albert Dodwell, Jacob Greenberg, Salvatore Schiovone, Otto Tropani, Ben Royback, Charles Madonia, Myron Menkin, Fred Knapp, Murray Goff, Eugene Messinia, Arthur Steele, William Johnson, Michael Solicito and Joseph Levitt in this case?

A. Yes, I spoke to all of them.

Q. And did they authorize you to act as their agent in their behalf in this action?

—. They authorized me to get an attorney for all of us and sue D. A. Schulte.

Q. They designated you the agent to bring this action?

A. In other words, they appointed me to represent all of them.

Q. Are you the shop steward in that building?

A. That is right.

Q. And do you customarily represent these men?

A. I customarily represent them on all union matters, and everything, generally, practically, concerning the employees.

Q. On or about September 24, 1942, were you paid a sum of money by the defendant in the sum of $256.36?

A. That is right.

Mr. Entes: That will be all.

The Court: You may cross examine.

[fol. 44] Cross-examination.

By Mr. Falk:

Q. How long have you worked in that building, Mr. Gangi?

A. Well, I started July 2, 1937. I remember the date distinctly because it was my wife's birthday, and I am still employed there.

Q. When you entered the employ of that building were you a member of the union?

A. Yes.

Q. Of what union?

A. Local 32-B.

Q. Of what? Give us the full name, please.

A. International.

Q. Is that the full name of the union?

The Court: Building Service Employees?

A. Building Service Employees, International Union, Local 32-B.

Q. Are you still a member of that union?

A. Yes.

Q. Have you been a member of that union at all times since these two dates?

A. I have been a member of that union ever since I have been employed here.

Q. Were all the other men whose names you mentioned, or with respect to whose names mentioned by your attorney and to which you gave answers just now, members of that union?

A. That is right. They could not have worked there if they were not, because we were under a closed-shop agreement.

Q. Do you recall the circum-tances under which you [fol. 45] received the money that you just testified you received on September 24, 1942?

A. I do.

Q. Was it by check or in cash?

A. Check.

Q. Who gave it to you?

A. Mr. Ryan, I believe.

Q. Is that the gentleman seated here at this table?

A. That is right.

Q. Was anybody else present?

A. The rest of the employees instigating suit.

Q. Were they all present?

A. Not present——

Q. Who was present when Mr. Ryan handed you the check?

A. Mr. Günther.

Q. Who?

A. Mr. Gunther, our superintendent.

Q. Where did this take place?

A. In the renting Agent's office on the sixth floor.

Q. Of what building?
A. That is right.

The Court: You say Ryan gave it to you?
The Witness: That is right.

Q. Did you sign the release, a copy of which is Exhibit A, attached to the answer in this action at that time? If you would like to see this copy I would be glad to show it to you.
A. I did sign it.

Mr. Entes: One minute, please. May we see it, please?
The Court: Show it to him and to the witness.

(Paper handed to Mr. Entes.)

[fol. 46] Q. Do you want to see it, Mr. Gangi?
A. Yes. (Examining) That is right.
Q. You signed the original of which this is a photostatic copy?
A. That is right.
Q. Is that other signature there the signature of Mr. Ryan?
A. It looks like it.
Q. Did he sign it in your presence?
A. That is right.
Q. You know is is his signature, don't you?
A. Naturally.
Q. Was the date filled in at that time?
A. Yes.
Q. Now when that paper was shown to you did you sign it immediately?
A. No.
Q. What did you do with it?
A. First of all, I called up the Wage & Hour Division——

The Court: Before you go any further, are you going to have this marked in evidence or for identification, or what are you going to do? I do not like to talk about a paper that is not identified in someway.

Mr. Falk: I'll put it in.

The Court: You have no objection to his offering a photostatic copy, have you?

Mr. Entes: No, we do not object to that.

Mr. Falk: May be you will concede on the record that this Exhibit A attached to the answer is a photostatic of [fol. 47] the original?

Mr. Entes: We will concede that.

The Court: I want something marked so we will know what we are talking about. Offer it in evidence.

Mr. Falk: I offer it in evidence.

Mr. Entes: No objection.

(Marked Defendant's Exhibit A.)

Q. Now what did you do with this Defendant's Exhibit A, Mr. Gangi, after it was given to you by Mr. Ryan on September 24, 1942?

A. Before I authorized the boys to accept it I wanted to call up the Wage & Hour Division to see if it was all right.

Q. Did you call them up?

A. I called them and I asked them if we had half-time or time and a half coming to us, and they said, "If I were you I would take what I could get and worry about the rest later, because if the law stipulates it is coming to you time and a half you will get time and a half sooner or later." That is the only satisfaction I got from the Wage & Hour Division.

Q. Did you speak to anybody else?

A. I spoke to some woman who answered the phone, that is all.

Q. I didn't hear that.

A. I spoke to the lady that answered the phone. That was all.

Q. Did you speak to anybody connected with the union?

A. I spoke to the union, yes.

[fol. 48] Q. With whom did you speak at the union?

A. My council chairman.

Q. Who was that?

A. Mr. Caeser Dankerlin.

Q. Did you speak to anybody else at the union?

A. That is all.

Q. Did you speak to the attorney of the union?

A. No.

Q. Did Mr. Dankerlin tell you he had spoken to the attorney for the union?

A. Mr. Dankerlin told me practically the same thing the Wage & Hour Division told me. "Take what you can and if the Supreme Court rules you have liquidated damages coming to you, you will get it."

By the Court:

Q. That is what he said to you, "If the Supreme Court rules you are entitled to liquidated damages, you are going to get it?"

A. "Sooner or later if you bring suit for it."

Q. That is what he told you?

A. Yes.

Q. You are very sure about that?

A. So I took his word for it.

Q. And you went back and got the money?

A. Yes.

Q. Did you tell Ryan that is what you had been told?

A. No, I did not tell that to Ryan.

Q. Did you think that was the square thing to do?

A. I told that to all the men who were getting those checks.

[fol. 49] The Court: All right.

By Mr. Falk:

Q. Where did you make those telephone calls from?

A. Where I worked, in the freight entrance.

Q. In the building?

A. That is right.

Q. The same day?

A. No. About a day apart.

Q. Now let us get this straight, Mr. Gangi: Did you receive this paper the first time on the date that you delivered it back signed to Mr. Ryan, or were those two different days?

A. I never saw that paper until the day they brought the checks over to sign.

Q. And was that the same day that you signed it and delivered it back to Mr. Ryan?

A. I did not deliver it back. Mr. Ryan took them with him.

Q. Maybe I don't understand you. But I gather from your testimony that Mr. Ryan handed you this paper; is that correct? You got this paper from Mr. Ryan, is that correct?

A. That is right.

Q. And at some time or other after that you signed it and gave it back to Mr. Ryan, is that right?

A. At the same moment he showed it to me I signed it.

Q. Then your telephone calls were not between the time you got the paper the first time and the time you signed it and delivered it back, is that right?

A. That is right.

[fol. 50] Q. When were the telephone calls with relation to your signing this paper?

A. Before Mr. Ryan brought those papers up.

Q. Were they after Mr. Ryan had given you the check?

A. The phone calls?

Q. The check.

A. Before. I called up before I got those papers.

Q. But after the check and those papers were tendered to you, you signed them, is that correct?

A. Yes.

Q. And prior to that time you had advised with your union?

A. That is right.

Q. And with the Wage & Hour Section?

A. That is right.

Q. And after so advising with both of those agencies you signed Defendant's Exhibit A and you advised the other men to sign the counterparts and deliver them back to Mr. Ryan, and you took the checks, is that right?

A. That is right.

Q. Did you say anything to Mr. Ryan at that time, either when you received the check or when you signed the paper and handed it back?

A. No, I just signed the paper and took the check.

Q. Had you had any previous talk with Mr. Ryan?

A. I think I did.

Q. Had you had any previous talk with him which [fol. 51] prompted your telephone conversations with the Wage & Hour Section and your union?

A. Yes. I think I told him that we are entitled to time and a half, and he felt as though we should take our overtime pay and forget the rest; that he thinks Schulte will pay out our overtime without the liquidated damages or the penalty that goes with it.

Q. Now, Mr. Gangi, isn't it a fact that you made a statement to that effect to Mr. Ryan in June of 1942, some three months before you get the check?

A. I do not know the exact time, but it was prior, before we got the checks, yes.

Q. It would be about three months, wouldn't it?

A. About that.

Q. Do you recall that it followed the rendition of the decision by the United States Supreme Court generally referred to as the Kirschbaum case?

A. Which building——

Mr. Entes: One moment. If your Honor please, I do not think the question is fair.

The Court: The witness can say, "I don't know," if that is the fact. The question is, do you remember whether that conversation took place after the Supreme Court decision, after you heard that the Supreme Court had decided a case called the Kirschbaum case.

[fol. 52] The Witness: No; that I don't know.

The Court: Or the arsenal case.

The Witness: No.

The Court: You do not remember that?

The Witness: No.

The Court: All right.

Q. Were you the shop steward in September, 1942?

A. That is right.

Q. But you were not in June, 1942, were you?

A. Well, let us see. About that time in 1942 I was elected shop steward.

Q. Wasn't it August?

A. I do not know the exact dates. I can check it.

Q. Who was the shop steward before you?

A. (No answer.)

Q. Maybe I can help you. Was it a man named Johnson?

A. That is right. William Johnson.

Q. Do you remember now that he was shop steward, until about August, 1942?

A. I do not remember the exact dates——

Mr. Entes: If your Hono- please, we object on the ground that it is immaterial who was shop steward before.

The Court: He may test his recollection.

Mr. Entes: But I do not think it has any bearing on the matter.

[fol. 53] The Court: He is trying to fix the date of the conversation. He is doing it in a perfectly normal, proper way.

Q. When was your first conversation with Mr. Ryan or anybody else representing the owner and the manager of the building prior to September 24, 1942?

The Court: Relating to this subject matter.

Mr. Falk: Relating to this subject matter.

A. The exact time I could not say. I could not remember the date.

Q. But you do remember that you had at least one conversation?

A. That is right.

Q. Did you have several with Mr. Ryan before September 24, 1942, on this subject?

A. No, just one that I know of.

Q. Now what was the substance of that conversation?

A. About this Wage & Hour Law.

Q. Just tell us what you said and what he said, not in the exact words, but the substance of it.

A. The substance was that they were willing to pay the overtime but not the penalty. That was just about the substance.

Q. You mean that is what Mr. Ryan said?

A. Yes.

Q. What did you say?

A. I said I would take it up with the boys and see what they wanted to do about it.

Q. Who initiated the conversation; you or he?

[fol. 54] A. I approached Mr. Ryan first.

Q. What did you say when you approached him?

A. I told him I felt as though we were entitled to our overtime under the Wage & Hour Law, and rather than go to court for it we wanted to see what he could do about it instead of creating any hardships or hard feelings amongst the employees, if we could get some kind of agreement with D. A. Schulte.

Q. Fix the conversation as nearly as you can, please, Mr. Gangi.

The Court: Fix the time.

A. The time? That I don't know.

Q. Was it after you became shop steward or before?

A. That I could not say either. I know I had spoken to Mr. Ryan, but which time I don't know.

Q. Did you have any further conversation with Mr. Ryan on that subject up to the time he handed you the check and you gave him the release?

A. No.

Q. Were you present when Mr. Ryan participated in any other such conversation?

A. No.

Q. Were you present prior to the time you became shop steward when Mr. Johnson had any conversation with Mr. Ryan on this subject?

A. I was not present, no.

Q. Did you have any conversation with Mr. Wise on this subject before September 24, 1942?

A. No.

[fol. 55] Q. Do you know who Mr. Wise is?

A. That is right. The gentleman sitting right there (indicating).

Q. What is his connection with the building?

A. He was renting agent for D. A. Schulte.

Q. And his office was there in the building, wasn't it?

A. Yes.

Q. And he was there all the time?

A. Yes.

Q. And Mr. Ryan only was there occasionally, is that right?

A. He would come in occasionally.

Q. Did you have any conversation at all on this subject with Mr. Wise?

A. No.

Q. Was Mr. Wise present at the time you received a check from Mr. Ryan?

A. He was still renting agent.

Q. Was he present in the room, do you remember?

A. I do not remember that. I do not think he was there.

Q. You are not sure?

A. I am not sure.

Q. Did you read this paper before you signed it, this Defendant's Exhibit A?

A. I did.

Q. Did you understand what it said?

A. Yes.

Q. Do you understand it now?

A. Yes.

Q. You have not any difficulty reading and understanding English, have you?

A. No.

Q. Did you say anything to Mr. Ryan at the time you handed him the paper to the effect that you were qualifying what you said here in writing?

[fol. 56] The Witness: Repeat the question.

Mr. Falk: Will the stenographer read it.

(Question read.)

By the Court:

Q. Did you say anything to Mr. Ryan?

A. No; I just signed the paper and that was all.

Q. You read it over?

A. Yes.

Q. Understood it?

A. Yes.

Q. You signed it?

A. Yes.

Q. And handed it back?

A. Yes.

By Mr. Falk:

Q. Do you remember Mr. Ryan speaking to you at any time about the fact that he did not regard this building as coming within the scope of the Wage & Hour Act?

A. No, sir, I do not remember that.

Q. You would not be sure he did not say that to you, though, would you?

A. No.

Q. He may have said that to you?

A. I don't know.

Q. You don't know?

A. No.

Q. Do you remember discussing with Mr. Ryan whether or not this building came within the scope of the Wage & Hour Act?

A. As far as I know practically all of the garment district came under the Wage & Hour Act.

Q. I did not ask you, sir, what you knew. I asked you whether you remember discussing the subject with Mr. [fol. 57] Ryan.

A. I spoke to Mr. Ryan about all this.

Q. When?

A. That I can't give you the exact date.

The Court: When you say "about all this," you mean you discussed with him about whether the building was under the law or not?

The Witness: I knew it was under the law because 80 or 90 per cent of the tenants engaged in interstate commerce directly or indirectly.

Q. Even if you knew it, it was possible that you discussed it, and I am asking if you did discuss it with Ryan?

A. I must have.

Q. You did discuss it with him, is that correct; is that your testimony?

A. Yes.

Q. You did discuss the subject with him?

A. I had to talk with him to get to an agreement somehow.

Q. Now why did you say a few minutes ago that you did not recall whether you discussed it with him or not?

A. I told you I spoke to Mr. Ryan before.

Q. Is that your best answer?

A. That is all I can tell you.

Q. Now your testimony at the present moment is that you did speak to Mr. Ryan about whether this building came within the Wage & Hour Act, is that correct?

A. Yes.

[fol. 58] Q. That is your testimony?

A. I could say that.

Q. Now what did you say to Mr. Ryan and what did he say to you in that conversation, and give us the date of it as nearly as you can and the place where it took place.

Mr. Entes: If your Honor please, the plaintiff has repeatedly stated that he could not remember the exact date ——

The Court: You are not going to testify for him. The record will disclose what he stated.

Go ahead, Mr. Falk.

A. As far as the dates are concerned I really could not say.

Q. Where did it take place?

A. 571 Eighth Avenue.

Q. What part of the building?

A. Sixth floor.

Q. Was it one conversation or several?

A. One.

Q. Was it the same conversation that you testified about a few minutes ago that took place at some time prior to September 24, 1942?

A. That is right.

Q. Will you please state the substance of the conversation, what Mr. Ryan said and what you said?

A. I told Mr. Ryan I felt as though we came under the Wage & Hour Act and that we are entitled to overtime back pay.

Q. What did Mr. Ryan say?

A. He said, "Well, as far as I know I can't give you [fol. 59] any answer myself. I will have to take it up with the office;" and he will let me know.

Q. Was that the entire conversation?

A. It was something around that. It revolved around that. That is about all.

Q. Was anybody else present?

A. Just Mr. Ryan and myself, and Mr. Gunther was in too, I think.

Q. Was Mr. Wise there?

A. I do not remember if Mr. Wise was there.

Q. Who was there?

A. I don't remember. I know Mr. Gunther was.

Q. Did you ever discuss this question of whether the Wage & Hour Act applied to this building with Mr. Wise?

A. No.

Q. You are sure of that?

A. I am pretty sure.

Q. Now after that conversation in which you say that you said to Mr. Ryan that you thought that the building came under the Act, and Mr. Ryan said to you according to your testimony that he would have to take it up with the main office and let you know, did you have any further conversation with Mr. Ryan on that subject?

A. Well, when he came back to give me his answer.

Q. When was that?

A. I don't know.

Q. In relation to the first conversation when was it?

[fol. 60] A. About two weeks or so, I guess.

Q. After the first conversation?

A. That is right.

Q. And before September 24, 1942?

A. I do not know dates.

Q. Well, the date of September 24, 1942, that I continually mention is the date that you got the check?

A. That is the date I got the check.

Q. Yes.

A. Yes.

Q. Now was this second conversation with Mr. Ryan on the subject of the Wage & Hour Act's applicability to the building between the time of the first conversation and the time you got the check?

A. It was prior to the day we got the check.

The Court: Go ahead.

Q. What was the substance of that conversation?

A. He said they were willing to pay half-time and see what the boys would want to do about it. If it was agreeable to the boys he would take it up and bring back the checks——

Q. Don't you remember whether Mr. Ryan said anything more than that?

A. I am just giving you about the gist of the whole matter.

Q. That is what I want, the whole matter.

A. I can't remember word for word everything.

Q. Oh, no; I don't want you to testify word for word. [fol. 61] Just the substance, Mr. Gangi.

A. Yes.

Q. Now according to your testimony, the way you left it with Mr. Ryan after the first conversation was that he was to take up with his main office the question of their view as to the applicability of the Wage & Hour Act to this building and come back and give you some word. Did he in the second conversation tell you what the main office had said?

A. Yes. That is what I am trying to tell you, that the main office was willing to pay us our overtime but no penalty.

Q. Did Mr. Ryan state to you the view of the main office with respect to the applicability of the Wage & Hour Act to this building?

A. I do not remember that.

Q. Did Mr. Ryan say to you at that time when, according to your testimony, he stated what the company was willing to do in the way of payment, that the company did not feel that the company came under the Wage & Hour Act?

A. I do not know if he ever said that. All I know is he said they were willing to pay us our overtime. If he said anything else I can't recall it.

Q. But you are not sure he did not say that?

A. No, I could not say he did not say it but I could not say he did say it.

Q. According to your best recollection Mr. Ryan may have stated to you at that time, may he not—

[fol. 62] A. He might have stated.

Q. ——that the main office felt that the Wage & Hour Act did not apply to the building?

A. He might have said that.

Mr. Entes: Your Honor, I object to the framing of that question because it is very confusing and dubious.

The Court: The witness is not having any trouble. I do not see why you should come to his aid.

Mr. Entes: The only reason is the way the question is framed. He asked a question and the witness is not responsive and he does not know exactly what he is trying to say.

The Court: I do not think this witness is having any trouble. He seems to be a very intelligent witness with a perfect command of language——

Do you have any difficulty in understanding counsel's questions?

The Witness: No.

Mr. Entes: For example he asked him, do you know whether or not he made such a statement. He said he does not know. And then he asked him again maybe he could have said it.

The Court: What are you going to do, tear up the whole practice of cross examination? It is an old, established practice. That is what the art of cross examination is for. [fol. 63] I do not think so far that any prejudice has come from it. If I thought that counsel on cross examination was inducing the witness to misstate himself I would come to his rescue. But so far it seems to me that this witness is conducting himself with agility, ability and understanding.

Q. Were you present at the time on September 24, 1942, that the other men who were your co-plaintiffs in this action got their checks and executed and delivered their releases?

A. No, I was not present. We all went in one at a time. The minute one came out the other one went in and got his.

Q. Now did you before that time when the checks were given out discuss with the other men your two conversations, one with the Wage & Hour Division and the other with the union?

A. I did.

Q. Did the men look to you for advise as to whether or not they should accept the checks and deliver the releases?

A. They left it all in my hands.

Q. You acted for all of them?

A. That is right.

Q. And you told them all to sign this release; in other words, papers that were similar to Defendant's Exhibit A, only different as to the amounts?

A. That is right.

Q. And upon your so advising them they did so?

[fol. 64] A. That is right.

Q. And received their checks at the same time?

A. Yes.

Q. You acted as spokesman for them on that occasion?

A. That is right.

Q. With Mr. Ryan?

A. I took up the case with Mr. Ryan.

Q. At that time you acted as spokesman for them, at the time they received their checks, is that right?

A. When they received their checks, I was not there——

Q. Not at the moment.

A. ——this was prior to receiving the checks I had that talk.

Q. Did you say anything to Mr. Ryan other than what you have already testified to, at that time?

A. No, I do not think so.

Q. You have testified to everything you said at that time?

A. That is right.

Q. Mr. Gangi, do you remember that when Mr. Ryan handed you the check he said to you that the building took the position that it did not come within the Wage & Hour Act?

A. I told you before I don't remember whether he ever said that. He might have said it——

The Court: No. At the moment he handed you the check did he say that? That is the question.

The Witness: No, not that I can remember. I could not [fol. 65] say.

Q. You are not sure that he did not?

A. I am not sure that he did and I am not sure that he did not.

Q. And if Mr. Ryan were to testify that he did say that and made a special point of saying that, you would not deny that?

A. I could not deny it and I could not confirm it.

Mr. Falk: That is all.

Mr. Entes: If your Honor please, may I ask a few more questions?

The Court: Of course you may. It is your redirect now.

Re-direct examination.

By Mr. Entes:

Q. Mr. Gangi, prior to the time you received the check on September 24, 1942, and at or about the time you had consultations with Mr. Ryan, did you have any legal advise whatsoever as to what your legal rights were in this action?

A. No——

The Court: Objection sustained. Legal advice is not an appropriate question.

Q. Did you consult any attorney with reference to what your rights might be with reference to the payment of overtime compensation?

A. Not prior to that, no.

Q. And when you called up the Wage & Hour Department did you speak to any attorney from the Wage & Hour Department?

[fol. 66] A. No, just the woman who answered the telephone.

The Court: You do not know whether she was a lawyer or not?

The Witness: No.

Q. And when you spoke to the union, Local 32-B, did you speak to any attorney connected with such union?

A. No.

Q. At any time prior to the time you received the check did you see any attorney whatsoever with reference to this claim?

A. I had never seen any attorney outside of yourself.

Q. Now, Mr. Gangi, at the time you received the check or prior to the time that you received the check from Mr. Ryan and subsequent to the time that you had your first conversation with Mr. Ryan, did you mention any amount of money that you were particularly entitled to, or any of the other men whom you represented were entitled to?

A. I figured we are entitled to overtime plus the penalty.

Q. Did you mention any specific sum of money; for instance, $250, $270, $220?

A. No, because at the time I did not know just exactly what my overtime would be.

Q. Prior to the time you received the check from Mr. Ryan, did Mr. Ryan have a conversation with you in which [fol. 67] he stated that they owed you $256 and some odd cents?

A. No.

Q. Did Mr. Ryan at any time tell you other than the time you signed the release that you were entitled to $256.36?

A. They never mentioned any amount.

Q. Did you ever mention any other figure other than $256.36 to Mr. Ryan or anybody from D. A. Schulte?

A. No.

Q. And as far as you know, of your own recollection, do you know whether or not any other man or men spoke to Mr. Ryan and stated that he owed them any other money other than the money stated on the release at the time they received the check?

A. No.

Q. When you spoke to Mr. Ryan at the time you received the check did he say to you he was giving you the check but that they did not believe that the building came under the Wage & Hour Act?

A. As I said before, I do not remember that.

Q. What part of the conversation do you remember?

A. All I remember is the part where he gave us the check and we signed and that was all. There was not very much of a conversation.

Q. Well, as far as your recollection is concerned, at any time either your first conversation with Mr. Ryan or your second conversation with Mr. Ryan, or at the time [fol. 68] you received the check, was there any discussion at those times, each separate time with Mr. Ryan, whether or not the building did or did not come under the Wage & Hour Act?

A. I said I don't remember.

Mr. Falk: If your Honor please, this is cross examination by plaintiff's counsel.

The Court: Yes, but he has already said "I don't remember," so I will save myself the trouble of ruling on the objection.

Your object, Counsel, is redirect, which means you may re-establish anything that may have been broken down in the course of the cross examination.

Mr. Entes: Well, if your Honor please, in cross examination——

The Court: Go ahead. I did not sustain the objection.

Mr. Entes: That will be all.

The Court: Any recross?

Mr. Falk: Yes.

The Court: Make it very brief.

Mr. Entes: Oh, just one other question.

The Court: All right.

By Mr. Entes:

Q. Mr. Gangi, at any time was there any dispute between you or any of the other employees with D. A. Schulte with reference to the amount of money that you [fol. 69] were to be paid?

A. No, no dispute at all.

Mr. Entes: That is all.

The Court: Wait a minute.

By the Court:

Q. You wanted overtime and penalties, isn't that correct?

A. Because I knew——

Q. I said, that is what you wanted?

A. That is right.

Q. But you took only the amount of overtime?

A. That is right.

By Mr. Entes:

Q. Well, there was no dispute with reference to the figure submitted at the time of the release, was there, between you and any of the other employees?

A. No, not that I know of.

Q. You all accepted the figures on the releases?

A. Yes.

Mr. Entes: That is all.

A. (Continued) Because we had figured pretty close to that ourselves.

Mr. Entes: That is all.

Recross-examination.

By Mr. Falk:

Q. Mr. Gangi, do you recall that before that day when the checks were handed to you Mr. Ryan had given you a list of the figures that you each were going to get, so that [fol. 70] you had an opportunity to verify them?

A. No.

Q. You don't remember that?

A. No.

Q. You do not say that that was not true, do you?

A. I do not remember that at all.

Q. Do you remember that some of the men went down to the main office of Schulte to check the figures from the books of the company?

A. No.

Q. You do not know one way or the other?

A. I do not know of any men going down to D. A. Schulte at all.

Q. You don't know?

A. If they did they did not tell me about it.

Q. You do not know yourself?

A. No, sir.

Q. Now when you called up the union that time you say you did not speak to the counsel for the union?

A. No.

Q. Have you ever spoken to the counsel for the union direct when you wanted legal advice, or is it customary for you to speak to one of the officers or one of the manag-

ers and assume that he was being advised by counsel to whatever extent was necessary?

A. I had taken the point that the council chairman would know as much as the attorney because the attorney would give that information to him, so his word was good enough for me without getting in touch with the attorney for the union.

Q. So if you had wanted to speak to the attorney for the union you would have done it, wouldn't you?

[fol. 71] A. Yes; but I did not think it was necessary.

Q. Now when you spoke to the Wage & Hour Division did you speak to someone who satisfied you by giving you whatever information you wanted at the time?

A. Just the woman who answered the telephone.

Q. Did you ask for anybody else?

A. No.

Q. Did she refuse to connect you with anybody else?

A. No. As a matter of fact she answered all my questions.

Q. To your satisfaction?

A. That is right.

Q. Did you ask to speak to the counsel there?

A. I did not ask for any counsel.

Q. Did you consider it necessary?

A. No.

Mr. Falk: That is all.

Mr. Entes: That will be all.

The Court: You may step down.

(Witness excused.)

[fol. 72] Joseph F. Collins, called as a witness on behalf of plaintiff, being first duly sworn, testified as follows:

Direct examination.

By Mr. Entes:

Q. Mr. Collins, what is your first name?

A. Joseph.

Q. Did you work for Mr. Nat Bass during the period of October 24, 1938, to February 5, 1942?

A. No, from 1938 to the latter part of 1941.

Q. What part of 1941?

A. Around September.

Q. And did Mr. Bass have a place of business on the southeast unit on the 6th floor of 571-583 Eighth Avenue?

A. He did.

Q. Were you familiar with the character and nature of the business of Mr. Bass at that time?

A. I was.

Q. Will you please tell the Court in your own words what the business consisted of at that time?

—. They dealt in what is known as American Press Boards.

By the Court:

Q. What do you mean they dealt? They bought and sold?

A. They bought the material and made it up.

Q. They manufactured?

A. Yes; and also in a small hand cleaner, a vacuum cleaner, known as the "Little Wonder", and a steaming machine known as a Steam Master. In addition, sundries that went with the various articles.

Q. They manufactured all these things or traded in them? [fol. 73] A. They manufactured most of them.

Q. The Little Wonder and the Steam Master—were they manufactured?

A. Both.

Q. On the premises?

A. They were assembled on the premises.

Q. From parts manufactured?

A. Yes, from parts manufactured.

By Mr. Entes:

Q. Where were those parts made?

A. Some of them were made in Massachusetts, some in Brooklyn, and other parts in some portion of Connecticut. The factory did an interstate business.

The Court: Strike that last part out.

Q. When you first received these parts what did you do with the parts?

A. We assembled them.

Q. And did you produce a complete unit when you had to assemble it together?

A. We did.

Q. And was this unit ready for sale?

A. Yes.

Q. Did you sell this unit?

A. Yes.

Q. And did you ship this unit?

A. Yes.

Q. Did you ship this unit outside the State of New York?

A. Yes.

Q. Can you tell the Court approximately what percentage of your goods and merchandise that you assembled was shipped outside the State of New York?

A. No, I could not.

Q. Would you say to the Court that at least 50 per cent [fol. 74] was shipped outside the State of New York?

A. I would not know that.

Q. Could you state to the Court how much of your business was citywide and how much was statewide and outside the State?

A. I would not know that either.

Q. These parts that you assembled, would most of those parts come in from outside the State of New York?

A. Yes.

The Court: He has already testified to that. We will take a short recess at this point.

(Short recess.)

By Mr. Entes:

Q. Mr. Colfins, did the firm of American Plus Board Velvet Company—did they have accounts outside the State of New York during the period mentioned?

A. Oh, yes.

Q. And where are these accounts located?

A. We practically sold in every state.

Q. And did you sell in any country outside the United States?

A. Canada.

Q. Any other countries?

A. Honolulu.

Q. Any other countries?

The Court: Are you referring to Nat Bass or some other company?

Mr. Entes: No, American Plus Board, Velvet Company is Nat Bass.

The Court: Same thing?

[fol. 75] Mr. Entes: Yes.

The Court: Oh, I did not know that.

Q. Did Nat Bass have any other outside salesmen at that time to solicit orders?

A. Yes.

Q. Did these salesmen take out-of-state routes?

A. They made trips regularly through the states.

Q. And did they cover the entire United States?

A. Yes.

Q. And were these accounts outside the State of New York regular, continuous accounts?

A. Yes.

Q. Were these accounts maintained practically during that entire period?

A. What period?

Q. October 24, 1938, to the latter part of 1941?

A. Yes.

The Court: And these salesmen sold the products which were all assembled at the building?

The Witness: Either assembled or built in.

Q. Did these salesmen sell the parts produced on premises 571-583 Eighth Avenue that you produced?

A. Yes.

Q. To these regular accounts?

A. Yes.

Q. And they sold continuously?

A. Yes.

Q. And in every state of the Union?

A. Practically every state of the Union.

The Court: We have had enough of that.

Mr. Entes: That is all.

[fol. 76] The Court: Any cross?

Mr. Falk: Yes.

Cross-examination.

By Mr. Falk:

Q. Mr. Collins, what was your position with Nat Bass?

A. Sales manager of the "Little Wonder."

Q. The Little Wonder was a small

A. A small vacuum cleaner.

Q. Didn't you sell the bulk of those right around the neighborhood, the garment center?

A. We sold a large part but not the bulk.

Q. How did you distinguish between the bulk and large part?

A. Because we sell large quantities in wholesale in other cities, and most of the men working, selling the "Little Wonder", sell them outside of the City.

Q. Were those salesmen people who were exclusively in your employ, or did they just sell these articles along with other articles?

A. No; exclusively in the employ of Nat Bass.

Q. What percentage would you say was sold in the State of New York and outside?

A. I would not know the percentage.

Q. Did you know the percentage when you were working there?

A. The largest percentage was sold outside the City of New York.

Q. Outside the City?

A. Outside of the State of New York. Outside of the State.

[fol. 77] Q. Didn't you do a big repair business there?

A. A very large one.

Q. And how many square feet did you have altogether? Supposing I asked you if you had 1500 feet, if I told you that the records show that, would you accept that?

A. Approximately. I would think so, yes.

Q. And isn't it correct that that represented about 1 per cent of the square feet of the entire building?

A. Well, I would only be guessing at that. I would not know that.

The Court: I assume there will be evidence as to that?

Mr. Falk: There will be, yes.

Q. So that in these 1500 square feet, representing

The Court: Whatever it does, 1500 square feet

Q. —Whatever it does, you say you did a big repair business?

A. Yes.

Q. And wasn't that repair business for people in the neighborhood?

A. Largely, yes.

Q. Wasn't that the major part of your business?

A. No.

Q. Can you give us any volume figures or dollar figures as to the products that you say were shipped out of the State of New York?

A. No, I cannot.

Mr. Falk: All right.

The Court: All right; you may step down.

[fol. 78] Mr. Entes: May I ask just one question?

The Court: All right. Be seated.

Redirect examination.

By Mr. Entes:

Q. Mr. Collins, how much of the 6th floor would you say that unit comprised, a half, a quarter, or a third?

A. Oh, a small portion of the 6th floor.

Q. Would you say it is a quarter of the floor?

A. Less than that.

The Court: 1500 square feet. I assumed before we are through we will know the area of the floor.

Mr. Entes: Yes.

That is all.

Mr. Falk: May I ask just one question, your Honor?

The Court: Yes.

Recross-examination.

By Mr. Falk:

Q. Mr. Collins, you testified, I believe, that you terminated your connection with Nat Bass at the end of 1941?

A. The latter portion of it.

Q. You are not connected with Nat Bass at the present time?

A. I am.

Q. You are still in the same building?

A. No.

Q. Is Nat Bass not in that building at the present time?

A. What building?

The Court: 571 Eighth Avenue.

[fol. 79] The Witness: He is not there now.

Q. But you are still with him?
A. I am with him.

Mr. Falk: That is all.
The Witness: Thank you.
The Court: Will counsel step forward please.

(Counsel approached the bench and conferred with the Court off the record.)

Mr. Entes: Plaintiff offers in evidence a schedule of the tenants in the premises in question for the period thereon indicated.

(Marked Plaintiff's Exhibit 1.)

The Court: Now, can you stipulate the total rentable area of the building?
Mr. Falk: About 150,000 square feet.
The Court: Is that agreeable?
Mr. Entes: I will assume it is correct.
The Court: All right. Now, let us look at Exhibit 1.

(Discussion off the record.)

The Court: Now, gentlemen, I am going to read the names of the tenants from Plaintiff's Exhibit 1, and first I shall ask plaintiff's counsel as to whether that is one of the tenants upon whom he relies to establish commerce or production of goods for commerce. I shall then ask [fol. 80] defense counsel whether he challenges or takes issue with that particular tenancy, and ask him to state the ground on which he challenges.
Mr. Entes: Your Honor, may I make a preliminary statement?
The Court: Would it be in the nature of proof?

CONCESSIONS AS TO TENANTS' BUSINESS

Mr. Entes: No. In order to facilitate this pre-trial conference. Most of the tenants of this building are dress contractors. I have chosen to take the tenants who engage solely in interstate commerce, so there is no question about it. Now, with the dress contractors the Court is probably very familiar with the fact that they manufacture or pro-

duce goods for one individual manufacturer or possibly two, or a jobber, who, in turn, does interstate commerce. Now, I must rely on each and every one of those, and not only must I rely on that, but if they challenge those particular contractors I must rely on the manufacturers whom they do work for. I have tried to eliminate all of these by asking them to stipulate these. Mr. Wise is familiar with what the tenants engage in in this building, and I am willing to rely solely on the question of law whether or not their defenses are valid.

The Court: Well, that is what we are going to do.

[fol. 81] Sea Island Thread Manufacturing Corporation. Mr. Entes, do you rely on that?

Mr. Entes: No.

The Court: Paul Schiff.

Mr. Entes: Yes.

The Court: How about that, Mr. Falk? Do you contest Paul Schiff?

Mr. Falk: I will ask these gentlemen.

(Mr. Falk confers briefly with Mr. Friedman and Mr. Wise.)

Mr. Falk: We concede that.

Mr. Entes: If your Honor please, may I mark whether it is conceded or not on my original copy which is before the Court?

The Court: Well, I would not like you to mark the exhibit. You can number them.

Bernard Shapiro, Inc.?

Mr. Entes: Yes. That is part of New York Woolens. It is affiliated with No. 2.

The Court: I do not care about that. The answer is yes. Mr. Falk, do you contest Bernard Shapiro, Inc.?

Mr. Falk: He does tucking and pleating——

The Court: I do not care what he does. Just tell me yes or no.

Mr. Falk: No, sir.

[fol. 82] The Court: You concede that?

Mr. Falk: No, sir.

The Court: You challenge that?

Mr. Falk: Yes.

Mr. Entes: If your Honor please, my client is excited because Bernard Shapiro and Paul Schiff are identical. There is another Shapiro Dress Company which is confus-

ing. If he concedes Schiff he must concede Bernard Shapiro.

The Court: How about that, Mr. Falk? Is Bernard Shapiro and Schiff the same thing?

Mr. Falk: It is the same thing as Schiff.

The Court: All right, Bernard Shapiro is conceded.

Mr. Falk: Paul Schiff and Bernard Shapiro are the same tenants.

The Court: You mean they occupy the same space?

Mr. Falk: That is right. You will find they overlap in the period of time.

The Court: But whatever it may be, you concede that item?

Mr. Falk: Yes.

The Court: Max S. Yuni.

Mr. Entes: He is part of our proof, sir.

The Court: You rely on that?

[fol. 83] Mr. Entes: Yes.

Mr. Falk: We challenge him.

The Court: On what ground?

Mr. Falk: He has refused us information.

The Court: Very well. You challenge him for lack of proof.

William Jarkow.

Mr. Entes: We don't rely on him, your Honor.

The Court: All right.

Ruben Orelick.

Mr. Entes: We don't rely on him.

The Court: Nathan Shapiro.

Mr. Entes: We rely on him.

The Court: Nathan Shapiro, Mr. Falk?

Mr. Falk: Challenged.

The Court: On what ground?

Mr. Falk: Local business.

The Court: Samuel Boyle.

Mr. Entes: He is part of plaintiff's proof.

The Court: You rely on him?

Mr. Falk: We challenge him on the ground that he is a contractor.

The Court: Thereby meaning that he manufacturers for some other people in New York?

Mr. Falk: Yes.

[fol. 84] The Court: All right.

Samuel Sunshine. Do you rely on him, Mr. Entes?

Mr. Entes: Yes. He is a dress contractor.

Mr. Falk: We challenge on the same ground, sir.

The Court: Metropolitan Button Works, Inc.

Mr. Entes: He is part of our proof.

The Court: Relied on by the plaintiff. How about you, Mr. Falk?

Mr. Falk: They are out of the building, sir.

The Court: They were in your building from October 1, 1933 to January 1944.

Mr. Falk: That is probably the lease, but Mr. Wise says they are out of the building now. They have been out for two years, he says.

The Court: Were they in the building during the period specified, October 1938 to February 1942?

Mr. Falk: For part of that period, but we do not know what their activity was. We were not able to question them because, presumably, this action came up after they were out.

Mr. Entes: If your Honor, please, I do not think these concessions are being made in good faith because Metropolitan Button Works and other of these firms are some of the best tenants in the building, and they say they don't even know the business of these people. Metropolitan Button [fol. 85] Works is the entire fifth floor.

The Court: But he says they moved out and they have not had a chance to find out what they are doing.

Mr. Entes: Mr. Wise has been there——

The Court: Mr. Falk, do you or do you not know?

Mr. Falk: We do not know. We know they made buttons, but we do not know what they did with them.

The Court: Nat Bass you have already covered.

Sidney Schiller. Do you rely on him?

Mr. Entes: We do not rely on him, sir.

The Court: All right. Herman Perlman and Vito Dia.

Mr. Entes: We do not rely on him.

The Court: Sidney Rosenthal.

Mr. Entes: We rely on him.

The Court: How about Sidney Rosenthal, Mr. Falk?

Mr. Falk: He is a contractor. Challenged on the ground that he is a contractor.

The Court: Philip Rosenthal.

Mr. Entes: Same as Sidney Rosenthal.

The Court: What about Philip?

Mr. Entes: They are one, the same floor space.

The Court: Do you want proof on Philip, Mr. Falk?

Mr. Falk: It looks as though Sidney Rosenthal succeeded. It is the same situation.

[fol. 86] The Court: Abraham Ash.

Mr. Entes: We rely on him.

The Court: How about you, Mr. Falk?

Mr Falk: We concede that about 20 per cent of his business was in interstate commerce.

Mr. Entes: We can't take a partial concession, your Honor.

The Court: You are willing to concede how much?

Mr. Falk: 20 per cent.

The Court: Do you want to prove more?

Mr. Entes: If your Honor is satisfied I am satisfied.

The Court: I am satisfied with that.

Osias Rieder.

Mr. Entes: We rely on him.

Mr. Falk: We challenge that.

The Court: Henry Cooperman.

Mr. Entes: Plaintiff does not rely on him.

The Court: Bergen & Germanowitz.

Mr. Entes: We rely on him. He is a dress contractor.

Mr. Falk: We challenge on the ground that he is a contractor.

The Court: Franks Merigome.

Mr. Entes: We rely on him.

[fol. 87] Mr. Falk: We challenge him on the ground that he is a contractor.

The Court: When you say you challenge on the ground that he is a contractor, do you mean that as a matter of law when a man manufacturers for another wholesaler in the State of New York, that even though that wholesaler is engaged in interstate commerce, nevertheless your man is engaged not in any production of goods for commerce, or do you mean you do not know what the wholesaler does with it?

Mr. Falk: I was just going to say that. I should think both. We do not know, but I would also rely on the first proposition which you stated; but we certainly don't know what happens to these goods after they leave the building; what the wholesaler does.

The Court: How about the tenant? Does he know?

Mr. Falk: I am not prepared to say whether he does or not. I imagine he does not. I do not see how he possibly could. I imagine the man for whom they are made does not know himself——

The Court: What are these mostly; dresses?

Mr. Entes: Yes, ladies' dresses.

Mr. Falk: There are some fur too.

Mr. Entes: Ladies' garments.

The Court: Is there any doubt in your mind that the [fol. 88] dress contractors know that the wholesalers or dress manufacturers whom they sell to ship dresses all over the United States? After all, this is the dress center of the United States.

Mr. Falk: Well, it is partially the dress center, but I believe there are big centers in Cleveland and other places. I think there is a tremendous retail market here.

The Court: There is no doubt about that.

Abraham Ash. That is the same one I had up above, isn't it?

Mr. Entes: Yes, but they took another floor.

The Court: Do you rely on Ash?

Mr. Entes: Yes.

The Court: What do you say about Ash? What did you say about Ash before? You conceded him?

Mr. Falk: 20 per cent.

The Court: Al Merkin and Selma Merkin.

Mr. Entes: Plaintiff does not rely on Merkin.

The Court: Isie Landesman.

Mr. Entes: Plaintiff relies on him.

The Court: What about Landesman, Mr. Falk?

Mr. Falk: He is a contractor, sir.

The Court: Columbia Belt Co. Inc.

Mr. Entes: Plaintiff relies.

[fol. 89] Mr. Falk: They refused information, sir. We can't concede it.

The Court: Benjamin Weinstein.

Mr. Entes: Plaintiff relies.

Mr. Falk: Challenged. A contractor, sir.

The Court: Ansonia Frocks.

Mr. Entes: Relied.

Mr. Falk: Challenged. Contractor.

The Court: Levy-Blum & Goldschmidt Corporation.

Mr. Entes: Relied. They had two floors. They moved from the 8th floor to the 14th floor.

The Court: We will come to the other floor in due time. Do you concede?

Mr. Falk: They manufacture.

The Court: What do they manufacture?

Mr. Entes: Ladies' coats.

The Court: Where do they ship those coats, do you know?

Mr. Falk: I don't know—they send them down to Seventh Avenue—we challenge.

The Court: I am not going to take time now to decide these issues. I am going to find out where we have issues.

Star Stitching Manufacturing Corporation—Star Pleating Corp.

[fol. 90] Mr. Entes: We rely on them.

Mr. Falk: We challenge on the ground that there are no interstate sales.

The Court: Morris Landau.

Mr. Entes: Plaintiff does not rely on Landau.

The Court: Meyer Appel & Mack Dicherman and The Grand Embroidery & Hemstitching Whs. Inc.

Mr. Entes: Plaintiff relies.

Mr. Falk: We challenge on the ground that it is strictly a local business.

The Court: Atlas Creations, Inc.

Mr. Entes: We rely on them.

Mr. Falk: We concede 75 per cent is interstate.

The Court: That should be good enough.

Mr. Entes: It certainly is.

The Court: Isidor Chessin.

Mr. Entes: We rely.

Mr. Falk: A Contractor. Challenged.

The Court: Isidor Chessin and Isreal Schneider.

Mr. Entes: Same parties.

The Court: Do you rely on him?

Mr. Entes: Yes.

Mr. Falk: Challenged.

The Court: Berg & Trager.

Mr. Entes: We don't rely on them.

[fol. 91] The Court: Morris Wolkin.

Mr. Entes: Plaintiff does not rely.

The Court: Joseph Swernofsky and Irving Swernofsky.

Mr. Entes: Plaintiff does not rely.

The Court: Abraham Brensiber.

Mr. Entes: Plaintiff relies.

Mr. Falk: Challenged. Contractor.

The Court: Richard Gray.
Mr. Entes: Plaintiff relies.
Mr. Falk: Challenged. Contractor.
The Court: Peter Spanzia.
Mr. Entes: Relied.
Mr. Falk: Challenged. Contractor.
The Court: Max Baker.
Mr. Entes: Plaintiff does not rely.
The Court: Pollock & Rappaport.
Mr. Entes: Does not rely.
The Court: Jerry Jarkow—William Jarkow.
Mr. Entes: Does not rely.
The Codrt: Model Pleating & Stitching Corp.
Mr. Entes: Yes. Plaintiff relies.
Mr. Falk: Mr. Wise tells me he never heard of them but this is on his list. We do not know anything about them.
The Court: You want to put him to his proof?
[fol. 92] Mr. Falk: Yes, just on the basis of not knowing.
The Court: Horowitz, Spaner and The Classy Frock.
Mr. Entes: Relied.
Mr. Falk: Challenged. Contractor.
The Court: Isie Landesman—Sam Landesman.
Mr. Entes: Relied.
Mr. Falk: We had him before, didn't we?
The Court: Yes, we did, but this is a different space or different period.
Mr. Falk: We challenge him too.
The Court: Mannie Bernstein.
Mr. Entes: Plaintiff does not rely.
The Court: Max Dobshutz.
Mr. Entes: Does not rely.
The Court: L. & D. Beilinson.
Mr. Entes: Plaintiff relies.
Mr. Falk: We challenge on the ground that he has got a showroom in New York City and manufacturers a local showroom.
The Court: Well, does he sell interstate? What do they manufacture?
Mr. Falk: Dresses.
The Court: And he does not sell his dresses outside of the State?
[fol. 93] Mr. Falk: I don't know.
The Court: You don't know. All right.

Katz and Martin A. Berman.
Mr. Entes: Plaintiff does not rely.
The Court: Philip Katz.
Mr. Entes: Same party. Does not rely.
The Court: Levine & Nachman.
Mr. Entes: Does not rely.
The Court: Levy Blum & Goldschmidt Corporation.
Mr. Entes: Does rely.
The Court: What did you do with him before?
Mr. Falk: We had that before. We challenged that one.
The Court: Molly Levy and Benjamin Levy.
Mr. Entes: They are all the same outfit.
The Court: Do you rely?
Mr. Entes: Yes.
The Court: Do you challenge him, Mr. Falk?
Mr. Falk: Yes.
The Court: Herman Zweig.
Mr. Entes: Plaintiff does not rely.
The Court: Charles Dimonda.
Mr. Entes: Plaintiff does not rely.
The Court: Samuel Stout.
Mr. Entes: Plaintiff does not rely.
[fol. 94] The Court: M. Morris Bluts.
Mr. Entes: Plaintiff does not rely.
The Court: Marion Ciappa.
Mr. Entes: Plaintiff does not rely.
The Court: Sam Yablon.
Mr. Entes: Plaintiff does rely.
Mr. Falk: Challenged on the ground of local business.
The Court: Maurice Newman.
Mr. Entes: Relied.
Mr. Falk: Same. Challenged.
The Court: Samuel Stout.
Mr. Entes: Does not rely.
The Court: Jack Herzog & Bro. Inc.
Mr. Entes: Does not rely.
The Court: Schottenfeld & Salzberg.
Mr. Entes: Relied.
The Court: What about that?
Mr. Falk: Challenged. Contractor, sir.
The Court: Arteraft Belts Inc.
Mr. Entes: Does not rely.
The Court: Maurice Newman.
Mr. Entes: That was mentioned before. We rely.

Mr. Falk: Challenged. Local man.
The Court: Harry Wang.
[fol. 95] Mr. Entes: Does not rely.
The Court: Abraham Ash.
Mr. Entes: I think they conceded Ash.
The Court: We had him several times before.
Mr. Entes: They conceded 20 per cent on Ash.
The Court: All right.
Evelyn Herlan and George S. Tizzani.
Mr. Entes: Do not rely.
The Court: Isidore Feld.
Mr. Entes: Do not rely.
The Court: Vincent Giamberdini.
Mr. Entes: Rely.
Mr. Falk: Challenged. Contractor.
The Court: Max Schneider.
Mr. Entes: We rely.
Mr. Falk: Challenged. Contractor.
The Court: Alfred Atlass.
Mr. Entes: Relied.
Mr. Falk: Challenged, local.
The Court: Samuel Cholmar.
Mr. Entes: Do not rely.
The Court: Abraham Kaufman.
Mr. Entes: Relied.
Mr. Falk: Challenged. Contractor.
The Court: Sadie Kaufman. It looks like the same outfit.
[fol. 96] Mr. Entes: If your Honor please, plaintiff does not rely on Alfred Atlass. Strike him out.
The Court: All right, that is withdrawn.
How about Sadie Kaufman? You rely and you challenge for the same reason?
Mr. Falk: Yes.
The Court: Schimel, Neukrug & Rieder.
Mr. Entes: Do not rely.
The Court: Paul F. Craziano.
Mr. Entes: Do not rely.
The Court: Kramer & Marks.
Mr. Entes: Do not rely.
The Court: A. Small Company, Inc.
Mr. Entes: Do not rely.
The Court: Lou Blond.
Mr. Entes: Do not rely.
The Court: Rose Ray Frocks.

Mr. Entes: Yes. Plaintiff relies.
Mr. Falk: Challenged. Contractor.
The Court: Schrader & Bazarnick.
Mr. Entes: Relied.
Mr. Falk: Challenged. Contractor.
The Court: H. Maimin & Company.
Mr. Entes: Plaintiff relies.
[fol. 97] The Court: Alfred Atlass you do not rely on—what about Maimin & Company?
Mr. Entes: Sure.
Mr. Falk: Challenged. That is a storage place—we concede 50 per cent.
The Court: That is good enough for you?
Mr. Entes: We will accept 50 per cent.
The Court: Alfred Atlass?
Mr. Entes: We withdrew Atlass.
The Court: Morris Fluss.
Mr. Entes: Withdrawn.
The Court: Nathan Wells.
Mr. Entes: Relied.
The Court: Relied? How about you, Mr. Falk?
Mr. Falk: Challenged. Contractor.
The Court: Moe H. Rosenzweig.
Mr. Entes: Relied.
Mr. Falk: Challenged.
The Court: Hyman Eisen.
Mr. Entes: Do not rely.
The Court: Aaron Hershkowitz.
Mr. Entes: Relied.
Mr. Falk: Challenged. Local business.
The Court: Israel Lazev.
Mr. Entes: Do not rely.
[fol. 98] The Court: Moe H. Rosenzweig.
Mr. Entes: That is the same Rosenzweig.
The Court: Do you rely on him?
Mr. Entes: Yes, sir.
The Court: What do you say about that?
Mr. Falk: Challenged. Local business.
The Court: Kaminin & Meadow.
Mr. Entes: Do not rely.
The Court: Riback Trimming Corp.
Mr. Entes: We rely.
Mr. Falk: We concede 5 per cent, sir.
Mr. Entes: We do not accept, sir.

The Court: Challenged. All right.
Samuel Schaffer.
Mr. Entes: We do not rely on him.
The Court: Nathan Wells.
Mr. Entes: We rely.
Mr. Falk: Challenged. Contractor.
The Court: Samuel Schaffer, again. I guess you do not rely on him?
Mr. Entes: No.
The Court: Maurice D. Steindl.
Mr. Entes: We rely.
Mr. Falk: Challenged. Local.
The Court: Agnes Sullivan.
[fol. 99] Mr. Entes: Relied.
Mr. Falk: Challenged. Contractor.
The Court: Carmine Fristachi.
Mr. Entes: Relied.
Mr. Falk: Challenged. Contractor.
The Court: L. Hirschfield & Company, Inc.
Mr. Entes: Do not rely.
The Court: William Zweifach.
Mr. Entes: Do not rely.
The Court: H. Maimin Company, Inc.
Mr. Entes: Same thing. We rely. They concede 50 per cent on that.
The Court: Max D. Diamond.
Mr. Entes: Rely.
Mr. Falk: Challenged. Contractor.
The Court: Benjamin Fischler.
Mr. Entes: If your Honor please, did they concede Maimin again?
The Court: I assume so. They conceded 50 per cent before.
Mr. Falk: Yes.
The Court: Benjamin Fischler.
Mr. Entes: Rely.
Mr. Falk: Challenged. Contractor.
The Court: Abraham Benenson.
[fol. 100] Mr. Entes: Do not rely.
The Court: Raizen & Treger.
Mr. Entes: Rely.
Mr. Falk: Challenged. Contractor.
The Court: Thomas Muscarella.

Mr. Entes: Rely.

Mr. Falk: Challenged. Contractor.

[fol. 101] The Court: All right. Now, those that have been challenged you will go ahead and prove as many of those as you want.

Mr. Entes: Well, the thing is this, your Honor. I have subpoenaed practically every one that I am relying on. If the Court at any time is satisfied——

The Court: I will never indicate that to you. Do you think I can remember that? Names do not mean anything here. It is space times time times percentage. It is a highly complicated formula.

Mr. Entes: All right, your Honor. We have no other choice than to bring everyone down.

The Court: How many of those that you rely on are challenged?

Mr. Entes: We have reduced the number from 58 people, as to which there are concessions about five or six, reducing it to 53, and if they insist on the challenge it would require another 30 or 40 people, because as a matter of law a contractor——

The Court: They told me they do not know whether the manufacturer for whom the contractor works does or does not ship in interstate commerce. The proper thing to have done would have been to have that covered by examination before trial. You can readily understand you can do it a great deal more efficiently by that method.

[fol. 102] Mr. Falk: Your Honor, the case would have been tried a couple of months ago. My understanding was that the adjournment was for the purpose of enabling counsel for the plaintiff to do that.

The Court: You can examine witnesses before trial, you know.

Mr. Entes: If your Honor please, I examined these witnesses personally and I spoke to them, and I was well aware of the nature of their business.

The Court: Yes, I know, but you can't put that in evidence.

Mr. Entes: Their position is, they are putting us to prove what they know——

The Court: No, no.

Mr. Entes: If your Honor please, we examined these people outside of court and we are well convinced they are engaged in interstate commerce.

Mr. Falk: Your Honor might be interested in Mr. Entes' affidavit (reading from affidavit).

Mr. Entes: If your Honor please, here is the situation. These are about 18 men, elevator men, of poor circumstances. Were I required to have disbursements to examine each and every tenant before trial and a subpoena duces tecum, it would run into about $150 or $200. These men were in no position to advance such disbursements. [fol. 103] Now, I honestly believe that D. A. Schulte is not interested in facilitating the trial, but making it as difficult as possible, and making it long.

The Court: You can hardly blame them under the circumstances.

Mr. Entes: I do not blame them for taking the procedure they do, but if they compel us to bring the witnesses, we are compelled to do that.

The Court: It might take a lot of time. However, you will proceed tomorrow——

Mr. Entes: If your Honor please, I have a witness here who found it very difficult to come and who finds it very difficult to return. I think his testimony will take about ten minutes, and if your Honor will be gracious enough we will put him on now as a witness.

The Court: How long will it take to cross-examine him?

Mr. Falk: I don't know.

Mr. Entes: Your Honor, L. & D. Beilinson are manufacturers. They concede they are manufacturers——

The Court: They can sit perfectly mum and say nothing, in which case you can go ahead and prove your case. That is one of the things he wants to argue, that they negotiated when they settled this case, so you have got to be reasonable with him in view of the position taken on this contro- [fol. 104] versy. It is a fact that it takes days to prove these cases that he was bargaining for. That is what he is going to claim.

Mr. Entes: All right. We are willing to go through that proof.

The Court: Put your witness on.

NORMAN JONAS, called as a witness on behalf of plaintiff, being first duly sworn, testified as follows:

The Court: When were you in the building, L. & D. Beilinson?

The Witness: March, 1941, to the present time.

The Court: What space did you occupy?

The Witness: I do not know the exact size of it.

The Court: What floor?

The Witness: 14th floor.

Mr. Entes: If your Honor, please, we have it in the plaintiff's exhibit marked in evidence.

Direct examination.

By Mr. Entes:

Q. During the period from May 1, 1941, to February 5, 1942, did L. & D. Beilinson occupy the northeasterly unit on the 13th floor?

A. Yes.

Q. Were you employed by that firm during that period?

A. I was.

[fol. 105] Q. And are you familiar with the nature and character of the business at that time?

A. I am.

Q. Did that firm manufacture or produce garments, ladies' garments?

A. We did.

Q. And after the garments were produced were these garments shipped outside the State of New York?

Mr. Falk: I object to the question on the ground that it is leading in form.

Q. Will you please tell the Court in your own words what happened to the garments after they were produced on the premises.

Mr. Falk: If he knows.

Q. If you know.

A. The garments were taken from our Eighth Avenue place over to our establishment at 1400 Broadway, where we conduct all the shipping, and from that particular place they were shipped to wherever the orders called for.

Q. Did any of the orders call for goods, the receipt of goods, outside the State of New York?

A. Yes, they did.

Q. And did the firm of L. & D. Beilinson maintain accounts in the different states of the United States?

A. We did and do.

Q. Do they continuously maintain these accounts?

A. They did.

Q. Did L. & D. Beilinson purchase goods to manufacture [fol. 106] these dresses?

A. Locally.

Q. Would you say that a considerable portion of the business that L. & D. Beilinson had were for accounts outside the State of New York?

Mr. Falk: I object.

The Court: Objection sustained.

Q. Do you know whether or not a good portion of the business——

Mr. Falk: I object.

The Court: Objection sustained.

Q. Do you know how much of the business that L. & D. Beilinson did was done outside the State of New York?

A. Yes.

Q. Roughly? Will you please tell the Court in rough figures how much of the business was done outside the State of New York?

A. About 85 per cent.

Mr. Entes: That is all.

Mr. Falk: I do not not understand that.

The Court: You develop that on cross.

Mr. Entes: Yes,

The Court: Go ahead.

Cross-examination.

By Mr. Falk:

Q. What position did you occupy, sir, with the concern of Beilinson?

A. Sales manager.

Q. You are there in that capacity now?

A. That is right.

[fol. 107] Q. Do you sell goods locally? By that I mean within the State of New York?

A. We do.

Q. Do you have customers within the State of New York?

A. We do.

Q. A large number?

A. Fairly large.

Q. About what is the volume of your business per year?

A. About $800,000.

Q. Dollars?

A. That is right.

Q. About how much of that is sold in the State of New York?

A. I would say about $125,000.

Q. $125,000?

A. That is right.

Q. And the rest is sold outside the State of New York?

A. That is right.

Q. Has that been the case during the last few years?

A. That is right.

Q. Where are these sales made? Do you have salesmen on the road?

A. We have salesmen on the road.

Q. Over at 1400 Broadway, from where the shipments are made, do you also ship out other goods besides those that are made in these particular premises?

A. Yes.

Q. Now, when you say 85 per cent, do you mean of all the goods shipped out of 1400 Broadway?

A. That is right.

Q. We are only talking about the goods that are made in this building on Eighth Avenue. What percentage of those goods are shipped outside of the State of New York, [fol. 108] if you know?

A. I can't say in that particular case what particular goods. We take them all together.

Q. I am asking you about these particular goods?

A. I imagine the same percentage.

Q. Please don't imagine. You say you can't say. Is that your answer?

A. That is right.

Mr. Falk: That is all.

Re-direct examination.

By Mr. Entes:

Q. Mr. Witness, have you *have* reason why the percentage should be less for these particular dresses rather than the other dresses?

Mr. Falk: I object to that.
The Court: The form is bad, but I will allow it.

A. There should not be any difference.

Mr. Entes: That is all.
Mr. Falk: I move that that answer be stricken.
The Court: Motion denied.
Mr. Falk: Exception.

(Witness excused.)

The Court: Adjourned until 10:30 tomorrow morning.
(Adjourned to December 15, 1943, at 10:30 a.m.)

[fol. 109] SALVATORE GANGI, ETC.,

vs.

D. A. SCHULTE, INC.

New York, December 15, 1943,
10:30 o'clock a.m.

Trial resumed.

The Court: You may proceed.

CHARLES SCHULMAN, called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct examination.

By Mr. Entes:

The Court: What tenant is this?
Mr. Entes: Levy-Blum & Goldschmidt Corporation, the northerly portion of the eighth floor and the entire 14th floor, different periods.

Q. Mr. Schulman, were you employed by Levy-Blum & Goldschmidt Corporation from the period October 24, 1938, to December 1, 1941?

A. Yes.

Q. And did Levy-Blum & Goldschmidt Corporation occupy the northerly portion of the 8th floor from the period of October 24, 1938, to January 31, 1940?

A. Yes.

Q. And did they thereafter occupy the entire 14th floor from February 1, 1940, to December 1, 1941?

A. Yes.

Q. And were you familiar with the nature and character of the business of your employer?

A. Yes.

Q. Will you please tell the Court what your firm did.

[fol. 110] A. Well, Levy-Blum & Goldschmidt have their factory right over here at 571 Eighth Avenue, and they shipped their merchandise to their shipping room, which is located at 512 Seventh Avenue. This is their own factory here, and from what my knowledge is, about 80 per cent of the merchandise shipped from our factory to their shipping room over there is shipped throughout the country.

Q. And has the firm accounts in different states of the Union?

A. Yes, in various states.

Q. And are these accounts continuous and steady accounts?

A. That is right.

Q. And has the firm had accounts for a period of years, for the period of years involved herein?

A. The number of years I have been with them, yes.

Q. Has the firm employed outside salesmen and sales accounts outside the State of New York?

A. Yes, they do.

Q. How many outside salesmen?

A. I don't know exactly offhand.

Q. Did they continuously have outside salesmen during that period?

A. Well, at various times.

Mr. Entes: That is all.

Cross-examination.

By Mr. Falk:

Q. Mr. Schulman, what position did you occupy during the time in question with this firm?

A. Well, I do the general receiving and shipping of the merchandise and taking care of the cutting tickets, and in [fol. 111] that case I know the various accounts and where the merchandise is being shipped to.

Q. I did not ask you what you knew at the moment. I asked you what your position was with them. What is your job?

A. Well, shipping clerk and receiving.

Q. Shipping clerk and receiving?

A. Yes.

Q. Is it a corporation?

A. Yes, a corporation.

Q. Has it been a corporation at all times?

A. Yes.

Q. Are you an officer of it?

A. No.

Q. You are not an officer?

A. No.

Q. Are you a director of it?

A. No.

Q. Are you a stockholder of it?

A. No, sir.

Q. When you shipped the stuff from there, doesn't it all go to this other address in New York City that you testified to?

A. Yes.

Q. What do you know about the disposition of that merchandise beyond the place to which you ship it?

A. Well, most of the cutting is done in our premises, where I am located now, at 571 Eighth Avenue, and all the merchandise that is being cut over there is usually given in with slips there on the various accounts because we do presumably—most of the business is done in coats and suits. Well, there is accounts where we ship to the Pacific Coast suitings, where in certain firms of the north coats [fol. 112] are being made, and in that case I am very familiar with the accounts that are outside the State of New York.

Q. Well now, just let us take what you specifically know. In what form does this material come into 571 Eighth Avenue?

A. Well, all the receiving of merchandise, including woolens and silks, usually comes in from Jersey and Pennsylvania.

Q. I didn't ask you that, Mr. Schulman. You are aware that counsel for the plaintiff is trying to establish that you are engaged in interstate business, are you not?

A. Yes.

Mr. Entes: If your Honor, please, I object to that.

The Court: Objection sustained.

Q. Are you trying to answer my questions or are you trying to establish as a lawyer on the witness stand that this is an interstate business?

Mr. Entes: If your Honor please, I object. The witness is a third party and has no interest in the case whatsoever.

The Court: Are you going to testify to that fact? He is on the stand.

Mr. Entes: All right.

The Court: I will allow him a reasonable amount of pressure on the witness. He is engaged in cross-examination.

Mr. Falk: Will you read my question?

[fol. 113] Q. (Read.)

A. No, sir.

The Court: Which is it, the first or the second?

The Witness: I am not trying to establish the fact that I am a lawyer on the witness stand.

Q. Now, I ask you in what form the material ordinarily comes into your place of business at 571 Eighth Avenue?

A. Piece-goods, in the woolen form only.

Q. It reaches you as the receiving clerk and shipping clerk in the form of piece-goods, is that right?

A. That is right.

Q. And it comes to you from the other place of business in Manhattan?

A. No, it comes from the woolen mill directly.

Q. Now when you ship it out as the shipping clerk, in what form is it?

A. Either coats or suits or skirts.

Q. Are they finished?

A. Finished.

Q. They are ready to put on and wear?

A. Ready to put on and wear.

Q. Buttons on and everything?

A. No, we ship them—from our premises we have the garments finished, but the buttons and the actual packing is done in the other place.

Q. I asked you whether they are ready to wear, and you said they were.

A. They are ready to wear. I mean, the garments are made up on our premises, but the details as to buttons and labels are not put on in our place.

Q. It one of those garments ready to wear until it has [fol. 114] buttons on it?

A. Yes, it is a finished garment.

Q. Is it sold to the ultimate consumer without buttons?

A. No.

Q. Where are the buttons put on?

A. In the other premises.

Q. Then it is not in the form in which it eventually reaches the consumer when it leaves your place, is it?

A. No, not directly.

Q. So that it leaves your place not as you testified before as a finished and absolutely completed garment, but as a partially completed garment, is that correct?

A. That is right.

Q. When these coats and suits leave your place of business they all go, do they not, to another address in Manhattan?

A. That is right.

Q. And beyond that what is done with those goods you do not know anything about of your own knowledge, do you? Yes or no.

A. Certainly I do. I know the accounts. I get the requests for other materials——

Q. Now, Mr. Schulman, when you send out 100 coats you send them all to this other address in New York City, isn't that right?

A. That is right.

Q. And that is all you know about that 100 coats, isn't it, of your own knowledge?

A. That is right.

Mr. Falk: That is all.

By the Court:

Q. Have you ever been over in the other premises?

[fol. 115] A. Yes.

Re-direct examination.

By Mr. Entes:

Q. Mr. Schulman, when you just testified that when you ship 100 coats to the other address, that is all you know—do you know the names of the accounts that the coats are shipped for?

Mr. Falk: I object to that question.

The Court: The question is "Do you know?" The answer should be either Yes or No. Then we will see if it is an objectionable question.

A. I am not 100 per cent certain on that. I can't say yes.

Q. But you do know the accounts of both offices?

A. Of the bulk of the merchandise.

Q. And do you know that these offices are located outside of the State of New York?

A. That is right.

Mr. Falk: I object to the question on the ground that the witness has already testified that all of these garments are shipped to this other place in New York City. That is the only account that he knows as a shipping clerk.

Mr. Entes: If your Honor, please——

The Court: Go ahead. I will let you develop it. If you think you can establish knowledge, I will let you do that.

Q. Do you know who the accounts are that are out, for [fol. 116] instance, around the Pacific Coast?

A. Yes.

Q. Do you know the name of the accounts?

A. Yes.
Q. Do you receive the account orders?
A. Well, we get the orders in the other place.
Q. But do you get the orders for the account?
A. We get the orders from the cutting tickets.
Q. And do you have the names on these accounts?
A. Yes.
Q. These accounts are numerous?
A. Yes.
Q. And they are in several states?
A. Variously distributed.
Q. All over the United States?
A. That is right.
Q. And you testified that you received woolens and silks and piece-goods, is that so?
A. Yes.
Q. Do you know from what states these woolens come from?
A. Specifically from Jersey and Pennsylvania.
Q. And you know that of your own knowledge?
A. Absolutely.
Q. And do you visit frequently the other place, the other office?
A. Yes, various times.
Q. And do you see the shipments made there?
A. Yes.
Q. And have you noticed where those shipments are made?
A. I used to work in the other place, too.
Q. You worked in the other place, too?
A. Yes; previous to this.
[fol. 117] Q. And do you know whether they made shipments outside the State of New York?
A. Yes.

By the Court:

Q. Do they ship any merchandice other than what is received in your plant?
A. Yes.
Q. They do?
A. Yes.

The Court: All right.
Mr. Entes: That is all.

Recross-examination.

By Mr. Falk:

Q. How much other merchandise does the other place have to ship besides the merchandise that comes from 571 Eighth Avenue?

A. They have a contractor.

Q. A contractor?

A. They have one contractor.

Q. Just one?

A. Just one.

Q. What part of the merchandise would you say comes from 571 Eighth Avenue?

A. About two-thirds of the merchandise.

Q. What do you base that on?

A. Well, the fact is we have about three times as many machines as the other place has, as a matter of production.

Q. Have you access to the books of the concern?

A. Well——

Q. Yes or no, please.

A. I have.

Q. You have?

A. Yes.

Q. To the ledgers and the books?

A. Yes.

[fol. 118] Q. And is it part of your duty to examine——

A. It is not part of my duty to, but it just so happens — well, they confide in me to that extent that I could take liberties and see.

Q. When these garments leave your place of business do they have any tags or marks on them?

A. No, just shipping tickets.

By the Court:

Q. Does it say which customer it is to go to?

A. No; that is not specified on order tickets.

Q. Your tickets do not show?

A. No.

By Mr. Falk:

Q. Where are the buttons put on?

A. In the other place.

Q. What else is done to the garments?

A. Well, labels, and they usually steam the coats up there, ready for shipping and packing in the boxes.

Q. Does the other place ship any of these finished garments to customers in New York City?

A. They send to a few accounts.

By the Court:

Q. This other place, is it operated by the same concern?

A. Yes.

By Mr. Falk:

Q. And to other places in New York City?

A. Yes.

Q. A substantial amount of merchandise?

[fol. 119] A. Not nearly, capacity speaking, to what they ship outside the State.

Q. What besides buttons are put on in this other place?

A. Labels.

Q. Is that all?

A. Labels and a tag. That is all. Everything otherwise is finished.

Q. The buttons are put on?

A. And labels, yes, ready for packing.

Q. Are any of these coats fur-trimmed?

A. Yes.

Q. Where is the fur put on?

A. The fur is put on in the factory where I am.

Q. Do you buy any raw materials from places in New York State?

A. Well, yes.

Q. Where do you get the fur?

A. We get that from New York State.

Q. You get it all from New York State, don't you?

A. No, Wisconsin.

Q. Some fur from Wisconsin?

A. Yes.

Q. What kind of fur do you get from Wisconsin?

A. Silver foxes.

Q. Do you get all the rest from New York State?

A. Yes, but that is our main bulk, is silvers.

Q. Where do you buy the silk?

A. The silk we buy from the New York office, and it all comes through——

Q. Wait a minute. Where do you buy the silk?
[fol. 120] A. New York.
Q. Where do you buy the woolens?
A. New York.
Q. What other materials do you use besides fur, silk and woolens?
A. Well, we have buttons, shoulder padding and various essentials for the garments; and canvas.
Q. Where do you buy them?
A. New York.
Q. You buy everything except this fur that comes from Wisconsin in New York?
A. Yes.

By the Court:

Q. Where did you say you bought the fur?
A. Wisconsin.
Q. Do you buy directly or through the New York office?
A. At times they buy directly and at times they buy from the New York office.

By Mr. Falk:

Q. That is only the silver fox fur, isn't it?
A. Well, that is our main business on the fur trimmed.

By the Court:

Q. When did you shift your place of occupation from the other address to 571 Eighth Avenue?
A. About four years ago.
Q. That would take us back to about 1940?
A. I was there before I went to the other place; I have been there also.
Q. Where were you employed during the period from October 24, 1938, to February 5, 1942?
[fol. 121] A. Employed at 571 Eighth Avenue.

Mr. Entes: May I ask one question?
The Court: One question.

Redirect examination.

By Mr. Entes:

Q. These woolens and silks that are bought from New York—do you know where they came from?
A. Yes.

Q. How do you know that?

A. Because I get the merchandise directly in from the mill.

Q. And have they got markings?

A. Yes.

Q. And do these markings indicate states other than the State of New York?

A. Absolutely.

Q. And you get a direct shipment?

A. Directly.

Q. You do not get it through the buying office?

A. No; right from the warehouse.

Recross examination.

By Mr. Falk:

Q. Where does the silk come from?

A. Lodi, New Jersey or Paterson, or Passaic.

Q. That is where it is dyed, isn't it?

A. No, it comes directly from the mill on a truck.

Q. Mr. Schulman, who sent you to come here this morning to testify?

A. Who asked me?

Q. Yes. You understand the question, don't you?

A. Yes.

Q. Will you please answer?

A. Mr. Entes.

Q. When did Mr. Entes ask you?

[fol. 122] A. Well, he asked me the other day to come down here, and as I was here yesterday and I heard I was to come down here according to the ruling at 10:30——

Q. How did Mr. Entes ask you? Did he call you up and ask you on the telephone?

A. Yes.

Q. Did you know Mr. Entes before that?

A. Never.

Q. How did he happen to speak to you, if you know?

A. Well, he happened to be speaking to Mr. Blum, who is one of the directors of the firm, and he happened to mention my name because I am in the employ of Mr. Blum for several years.

Q. Were you subpoenaed to come here?

A. Not directly.

Q. You are here voluntarily?

A. That is right.

Q. As a favor to Mr. Entes?

A. As a favor. No. On request of my boss.

Q. Did you have a conference with Mr. Entes about your testimony before you came here?

A. No, I didn't have any.

Q. You did not talk to him at all before you took the witness stand?

A. I don't know the man.

Q. What?

A. I never met him personally.

Q. I mean before you took the stand.

A. No.

Q. How is it in your answers you have been so eager, particularly in your early answers, to stress the interstate [fol. 123] part of that business——

A. Because I have knowledge——

Mr. Falk: Just a minute please, until I finish my question.

Q. (Continued) — so eager to stress the interstate part of your business, and so eager to withhold any statements about the trade inside of New York State until I elicited it from you by questioning?

Mr. Entes: Your Honor——

The Court: There is a question on the table. There is no objection to it.

A. I am not biased in any way in this case. It does not interest me one way or the other. It is just the fact that I have that knowledge about it, about where the merchandise comes from, and I feel it is my duty to tell what is right.

Mr. Falk: I would ask the stenographer to read my last question, and I want you to see if that is your best answer.

The Court: No. That is his best answer. He has reflected on it and he has given his answer. If you want to put another question, you may.

Mr. Falk: That is all.

Mr. Entes: May I ask one more question?

The Court: All right.

Redirect examination.

By Mr. Entes:

Q. Is it a fact, Mr. Schulman, I served a subpoena on [fol. 124] Mr. Blum in your presence on the premises 571 Eighth Avenue?

A. Yes.

Q. And isn't it a fact that I spoke to Mr. Blum and Mr. Blum introduced you to me for the first time?

A. That is right.

Q. And isn't it a fact that Mr. Blum said, "I will send my employee down to testify in reference to this case"?

A. Yes.

Q. And is it because of that subpoena and Mr. Blum's instructions that you are here to testify?

A. That is right.

Mr. Entes: That is all.

The Court: You may step down.

(Witness excused.)

The Court: Call your next witness.

[fol. 125] ISIDORE CHESSIN, called as a witness on behalf of the plaintiff, being duly sworn, testified as follows:

Direct examination.

By Mr. Entes:

Mr. Entes: For your Honor's information, he occupied the southeast unit on the 11th floor.

The Court: What is the name of the firm?

Mr. Entes: Isidore Chessin is the name of the firm.

The Witness: No. The name of the firm is the Proper Dress.

The Court: How is it listed on your schedule?

Mr. Entes: Isidore Chessin. He had the southeast unit on the 11th floor and then the entire south unit on the 11th floor.

The Court: All right.

Q. Mr. Chessin, did you occupy the southeast unit on the 11th floor on February 1, 1935 to January 31, 1940,

and did you occupy the south unit on the 11th floor from February 1, 1940 to the present time?

A. I am in this loft since about 1932, if I am not mistaken.

Q. Now, did you occupy——

A. And I changed over in 1941, I guess; I moved a part of my loft, not the whole.

Q. You increased your loft?

A. I changed over part.

Q. And what business were you in from the period of [fol. 126] October 24, 1938 to February 5, 1942?

A. Making dresses.

By the Court:

Q. Are you a manufacturer?

A. Contractor.

Q. You are a contractor?

A. Yes.

Q. Do you have machines on the premises?

A. That is right.

By Mr. Entes:

Q. You have machines on the premises?

A. That is right.

Q. And whom do you produce your dresses for?

A. We produce for a couple of houses.

By the Court:

Q. How many?

A. Two.

Q. Two houses?

A. Yes.

Q. Who are they?

A. Darny Frocks, 525 Seventh Avenue.

By Mr. Entes:

Q. And what is the other?

A. Margot Dress.

The Court: Where are they?

The Witness: 498 Seventh Avenue.

Q. Are these the two manufacturers you were making dresses for from the period of October 24, 1938 to February 5, 1940?

A. We worked for different houses in between too.

Q. But are these the biggest houses you worked for at that time?

A. These are the main houses, yes.

Q. And how many men did you have in your employ approximately at that time?

A. What time?

[fol. 127] Q. I am only interested in the end of October 1938, October 24, 1938 to the beginning of 1942.

A. About 40 people. 1938 I did not work for the Margot.

Q. Well, the beginning of 1939?

A. I worked for Margot since 1940. I worked for the Darny and the Columbia Dance Frocks in 1938.

Q. Whom did you work for in the year 1939?

A. Darny Frocks I worked, and I did work for Columbia Dance Frocks.

The Court: Where were they located?

The Witness: They were located at 1385 Broadway and 525 Seventh Avenue. They are out of business.

Mr. Falk: Your Honor, may we have it noted, if it is the case, that all of these addresses which are given merely as street address are in New York City?

The Court: Yes, they are in New York City. The Court will judicially notice that.

The Witness: Yes, New York City.

Q. Mr. Chessin, will you please tell the Court in your own words what your men do?

The Court: They make dresses; isn't that right?

A. Make dresses.

The Court: Now, why waste time?

Q. Do you buy your own merchandise?

A. We do not buy no merchandise. Only trimmings; certain trimmings we buy.

[fol. 128] Q. Where do you buy the trimmings from?

A. Trimming stores.

Q. In New York City?

A. Yes.

Q. Where do you get your goods, your materials?

A. From the jobber.

Q. Do you know where the goods come from of your own knowledge?

A. Well, I don't know. I think from certain places in New York City as far as I know.

Q. After you make your dress for the jobber, do you know what happens to those dresses?

A. They sell them, I guess.

Q. Do you know where they are sold?

Mr. Falk: I object to that question on the ground that it is irrelevant and immaterial.

The Court: I will overrule your objection.

Mr. Falk: Also on the ground that it is incompetent. He does not know——

The Court: The question is whether he does know. That is the only question I have before me.

A. I don't know where they are sold, but I surmise——

Mr. Falk: Well now——

The Court: Stop at that point.

Q. Do you make sample dresses for the salesmen of those jobbers?

A. Duplicates, yes.

Q. And are these samples dresses given to salesmen [fol. 129] who travel outside of the State of New York?

A. Yes.

By the Court:

Q. Do you give them to the salesmen?

A. We don't give them. I give them to the jobber.

Q. You don't know what he does with them?

A. I think, so far as I know, he does.

Mr. Falk: I move that that be stricken out.

The Court: That will be stricken out. Unless you know don't tell us what you guess or surmise.

By Mr. Entes:

Q. Do you know the names of any accounts outside of the State of New York where your dresses go to, of your own knowledge?

A. I don't ~~know definitely~~ because I haven't got no*t* statement.

Q. When the jobber gives you these dresses do you ever have any conversation——

The Court: You are not going to produce that, I am sure. What is the use of wasting time? You do not suppose that kind of conversation can become admissible?

Q. Do you visit the jobber or the manufacturer during your time in business?

A. Yes, we come up quite often.

By the Court:

Q. Do you visit them or do they visit you?

A. They visit me and I visit them.

By Mr. Entes:

Q. Do you see them packing and putting these dresses [fol. 130] away in packages?

A. Yes.

Q. And have you seen these packages marked?

A. That is right.

Q. And have you noticed whether or not these markings were for outside of the State of New York?

Mr. Falk: I object to that question on the ground that it is irrelevant——

The Court: It is leading.

Q. Do you know where these dresses are located, generally?

A. Some of them.

Mr. Falk: I object to this question on the ground that it is irrelevant and immaterial.

The Court: Objection overruled on that ground.

Mr. Falk: Exception.

Q. Do you know where your dresses marked on the packages being shipped are for?

Mr. Falk: I make the same objection, and also as to the form of the question, on the ground that it is leading.

The Court: Well, frame your question so it will elicit the answer.

Q. Do you know where the goods are shipped from the markings on the packages?

By the Court:

Q. Have you read these markings? Have you seen these [fol. 131] markings on these packages?

A. Sometimes maybe I did.
Q. Sometimes maybe you did?
A. But I can't make a definite statement where it goes.

The Court: Now, the witness does not know. You can't get blood out of a turnip.

By Mr. Entes:

Q. Mr. Chessin, when you got to the manufacturer do you ever have any contact with any visiting buyers of the manufacturer?

Mr. Falk: I object to the question.
The Court: I will overrule that objection. Go ahead.
Mr. Falk: Exception.

A. No.
Q. You never meet any buyers?
A. No.

The Court: Any questions?
Mr. Falk: No questions.
The Court: Step down. You are excused.

(Witness excused.)

Samuel Sunshine, called as a witness on behalf of the plaintiff, being duly sworn, testified as follows:

Direct examination.

By Mr. Entes:

Q. What floor are you on, Mr. Sunshine?
A. 5th.

Mr. Entes: The name of the firm is Samuel Sunshine, [fol. 132] your Honor.
The Court: That is the tenant?
Mr. Entes: Yes, sir.
The Court: All right.

Q. Mr. Sunshine, did you occupy the southerly portion of the 5th floor from September 1941 to the present time?
A. Yes, sir.

Q. And did you occupy any other part of the premises before that time?

A. Oh, way back I did; about ten years ago I did that.

Q. Did you occupy any part of the premises in 1938, the end of 1938 to that time?

A. No, sir.

Q. What business are you in?

A. Dress contractor.

Q. And during the period of time from 1941 to the early part of 1942, February 1942, were you such dress contractor?

A. Yes, sir.

Q. And whom did you produce your dresses for, manufacture for?

A. Several jobbers.

By the Court:

Q. What are their names?

A. William Blum.

Q. Where is he located?

A. 498 Seventh Avenue.

Q. Who else?

A. Phoenix Sportswear.

Q. Where are they located?

A. 525 Seventh Avenue.

Q. Anybody else?

A. Townley Frocks.

Q. Where are they located?

A. 550 Seventh Avenue.

[fol. 133] Mr. Falk: Will your Honor take judicial notice again that they are all in New York City?

The Court: Yes, I will notice New York City addresses judicially.

By Mr. Entes:

Q. Mr. Sunshine, how much of your business did you give to each manufacturer? Were they equally divided?

A. No, they were not equally divided. It all depends on how big the seasons each one had.

Q. I am interested in the season of 1941, September of 1941 to February of 1942. Can you recollect who got what part of that business?

A. For instance, it used to run from—some had more business, I gave them more, and some had less business——

Q. I may have to refresh your memory. Just for a moment see if you can remember just this period, no other period, September 1941 to February 1942. That would be the Winter and Fall of 1941. Would that refresh your memory?

A. Yes.

Q. Whom did you give the bulk of your business to, if you know?

A. Phoenix.

The Court: What is your total volume of business for that year?

The Witness: Oh, about forty to fifty thousand units.

[fol. 134] Q. Now, Mr. Sunshine, do you buy the merchandise that goes into making up the dresses?

A. No. You mean piece goods?

Q. The piece goods, yes.

A. No.

Q. Where do you get the piece goods?

A. From the jobbers.

Q. Do you get these piece goods direct from the jobber or——

A. I get it from the people that I do business with, the jobbers.

Q. You get it from their place of business?

A. Yes.

By the Court:

Q. That is from Blum or Phoenix?

A. Right.

Q. They make the merchandise available to you?

A. That is right.

By Mr. Entes:

Q. And do you make sample dresses for these jobbers?

A. No.

Q. Do you ship any of the merchandise, the dresses, other than to the jobbers?

A. Only to the jobbers.

Q. And do you know of your own knowledge what becomes of the dresses after you ship them to the jobbers?

Mr. Falk: I object to the question on the ground that it is irrelevant and immaterial, after they are shipped from his place to the jobbers.

The Court: Objection overruled.

Mr. Falk: Exception.

[fol. 135] By the Court:

Q. The question is, do you know? The answer should be yes or no.

A. I don't ship anywhere else except to jobbers.

Q. The question was, do you know what happens to the dresses after they leave your place?

A. Yes.

Q. Do you know of your own knowledge?

A. Yes, I know of my own knowledge.

By Mr. Entes:

Q. What happens to the dresses after they are shipped?

Mr. Falk: I make the same objection, sir.

The Court: Same ruling.

A. They ship them to Chicago, Cincinnati and different places. I knew that from facts.

The Court: They told you that?

The Witness: Yes.

The Court: You make your motion?

Mr. Falk: I move that be stricken out.

The Court: It may be stricken.

Q. Do you ever visit the premises of the jobbers?

A. Yes.

Q. And do you visit the shipping room of the jobbers?

A. Yes.

Q. And have you seen them ship the dresses?

A. Yes.

Q. And have you seen the accounts that the dresses are [fol. 136] shipped to?

A. I seen the address, the boxes, shipped to Marshall Field, Chicago, and Charles Stevens; different places.

Q. And from your experience in those visits to the jobbers would you say that the dresses are shipped to various States of the Union other than New York?

A. Oh yes.

Mr. Falk: I object to that question on the ground that the witness previously said that his knowledge was acquired by what he was told. I do not think the basis has been laid. I move that that last answer be stricken out.

The Court: He says now that he saw some boxes actually being addressed.

The Witness: That is right.

Mr. Falk: To Marshall Field in Chicago.

The Court: Now, he could not have seen very many.

By the Court:

Q. You do not spend your time there, do you?

A. No, as I come in——

The Court: That goes to the weight.

Mr. Falk: There is no proof, sir, that they were his dresses or that the boxes——

The Court: That will be developed.

Q. Are you the only contractor working for William [fol. 137] Blum?

A. No.

Q. Are you the only contractor working for Phoenix Sportswear?

A. No, sir.

Q. Are you the only contractor working for Townley Frocks?

A. No.

The Court: All right.

By Mr. Entes:

Q. Have you ever seen your dresses being shipped, wrapped in a package?

A. Certainly I did see some.

Q. And were these dresses your dresses that were being packed, marked for an account outside of the State of New York?

A. Yes.

Q. How frequently, Mr. Sunshine, would you say you visited these places?

A. Occasionally. You see, when they have special orders they call me and say, "Mr. Sunshine, you must deliver this order for Friday; that has to go to this and this account."

Mr. Falk: I——

The Court: The latter part will be stricken out.

Mr. Entes: If your Honor please, the reference to a conversation with the manufacturer——

The Court: I understand it is difficult to prove these things. But we cannot modify the law of evidence.

[fol. 138] Mr. Entes: I am not trying to circumvent any rule of evidence. The thing is this: Some of these particular accounts are handled in a particular way. For instance, Montgomery Ward——

The Court: Well, he does not know.

Mr. Entes: If his jobber instructs him that it is for Montgomery Ward, and the merchandise has to be handled or worked on a special way, he knows that it is for Montgomery Ward.

The Court: It does not mean it goes to Montgomery Ward. Maybe the jobber wants to impress him. Maybe he just wants it done in that special way and that is why he tells it to him. For all you know he may be doing it for Schmolowitz & Schmolowitz on Division Street, and not for Montgomery Ward. That is not evidence.

Q. Well, anyway, you have seen your packages marked for places outside the State of New York?

A. Yes.

Q. Have you ever seen the orders for your dresses, the account orders?

A. The original orders?

Q. Yes.

A. Yes.

Q. Have you seen duplicate copies of orders?

A. Yes.

By the Court:

Q. How did you know they were for your dresses?

A. Well, as a rule we know—we have style No. 618, and 618 is made by me.

[fol. 139] Q. And anybody else?

A. As a rule they don't switch styles.

Q. As a rule?

A. Yes.

By Mr. Entes:

Q. And you are able to identify these dresses by the numbers and style numbers, is that so?

A. Yes.

Q. And have you seen these accounts? Were these accounts outside the State of New York?

A. You asked me if I have seen orders——

Q. You have testified you have seen orders.

A. Yes, occasionally they would come and show me and say "Here is a re-order on your number so and so."

Mr. Falk: I move that that be stricken out on the ground of hearsay.

The Court: No. The part that was said to him will be stricken out.

Q. These accounts that you actually saw were for accounts outside of the State of New York, is that right?

Mr. Falk: I object to the question on the ground that it is irrelevant, incompetent and immaterial.

The Court: It is leading. I have a very good idea as to how much this witness knows about it.

Mr. Entes: That will be all.

The Court: Cross-examine.

Mr. Falk: No cross.

[fol. 140] The Court: You may step down.

(Witness excused.)

Mr. Entes: If your Honor please, may I ask the Court for a short recess? I have subpoenaed six or seven people down and I have spaced them a little. I expected one witness at 11 o'clock and another witness at 11:15, and neither one has come down as yet.

The Court: Have you got another witness here?

Mr. Entes: No, I haven't, your Honor.

The Court: Do you know when you are going to have another witness?

Mr. Estes: I have been in touch with these people continuously by telephone. As your Honor is well aware, I have about 46 witnesses.

The Court: And when you have that number you should keep them on tap.

Mr. Entes: I have them on tap, but I can't have these gentlemen come down at a certain time. A lot of them are

sick. There is an epidemic of colds and flu, and these dress contractors happen to be in the height of their season; and I am not going to take it in my power and disrupt their business if I can possibly help it.

The Court: Well, we do not want to disrupt the business of this court either.

Mr. Entes: Will your Honor take a short recess of ten [fol. 141] minutes?

The Court: Very well. We will take a short recess.

(Short recess.)

The Court: Please proceed.

Mr. Entes: Mr. Silverstein.

Morris Silverstein, called as a witness on behalf of the plaintiff, being duly sworn, testified as follows:

Direct examination.

By Mr. Entes:

Q. What floor are you on?

A. 8th floor.

The Court: Is that the tenant's name?

Mr. Entes: Yes. There is a joint tenancy between Morris Silverstein, Harry Gross and Ansonia Frocks.

The Court: Is Harry Gross your partner?

The Witness: Yes.

Q. Mr. Silverstein, are you an officer of the corporation of Ansonia Frocks?

A. That is right.

Q. Incorporated.

A. Yes.

Q. Did the corporation and yourself do business on the northerly portion of the 8th floor from February 1, 1941 to February 5, 1942?

A. That is right.

Q. What business were you in at that time?

A. Dress contractor.

Q. You made dresses there for a manufacturer or a [fol. 142] jobber?

A. A jobber.

Q. During that period how many jobbers did you have?
A. Well, mostly one jobber.
Q. Most of your work is for one jobber?
A. Yes.
Q. Will you please give the Court the name and address of that jobber?
A. University Frocks, 1400 Broadway.
Q. What was the address?
A. 1400 Broadway.
Q. Did you buy any of the materials for the dresses yourself?
A. No; we get the materials from the jobber. We only buy trimmings, small items, very small items.
Q. And how many men did you employ during that period, average?
A. Average about 40 people.
Q. Do you know of your own knowledge what happens to the dresses after you send them to the jobber?
A. Well, they ship them in various parts——

Mr. Falk: Just one minute. That question calls for a yes or no answer.
The Court: Do you know or do you not know?
The Witness: What is the question again, please?
The Court: Do you know to where the dresses are shipped?
The Witness: Yes, sir.
The Court: How do you know?
The Witness: By going up to the jobber almost every day.
[fol. 143] The Court: And what do you see there?
The Witness: I see the way the packages are shipped and addressed to the various parts of the country.
The Court: Does University Frocks have dresses manufactured by any other contractor?
The Witness: Yes.
The Court: Do you know whether those packages contain your dresses?
The Witness: Well, I see my styles.
The Court: All right, go ahead.

Q. Do you recognize your dresses by your styles?
A. Exactly.
Q. Are they different from the style and dresses of other contractors?

A. That is right.

Q. And you can recognize them particularly?

A. I know the styles that we make.

Q. And these are the dresses you see packed and shipped all over the country?

Mr. Falk: If your Honor please, I want to make a general objection so I won't have to interrupt all the time. We want to preserve our rights on the question that even if it should be proved that these dresses after going to the jobbers are shipped out of the State, it would not be interstate commerce so far as these witnesses are concerned.

[fol. 144] The Court: I understand your point. I will give you a general objection on that throughout the case.

Mr. Falk: Thank you, sir.

Mr. Entes: Plaintiff will take an exception to that for the record.

The Court: Exception to what?

Mr. Entes: To the statement of law.

The Court: Oh, I thought you were taking an exception to the ruling. I made no ruling. You do not agree with your adversary. I am very well aware of that.

By the Court:

Q. Do you know what proportion of the dresses you manufacture are sold inside the State of New York and what proportion are sold outside the State of New York?

A. That I could not tell.

Q. You don't know?

A. No.

By Mr. Entes:

Q. But do you know for a fact of your own knowledge that some portion of your dresses go outside the State of New York?

A. Definitely.

Q. And do you know whether that is a large portion or not?

A. I do not know what portion. I would not say.

Mr. Entes: That is all.

Cross-examination.

By Mr. Falk:

Q. When you go over to the University Dress Company, [fol. 145] when you go over there, do you go over there to see the boss?

A. That is right.

Q. Or do you go over to see the shipping clerk?

A. Well, I go through the shipping clerk's office when I go in, and I go out.

Q. Is it a big concern?

A. It is a large concern.

Q. How much space have they got, about, a whole floor or a half floor or what?

A. It is a very large building. They have got part of a floor.

Q. Part of a floor?

A. On the 11th floor.

Q. Do they do their shipping to other customers from that 11th floor?

A. That is right.

Q. And do they receive the goods there from you and from other people and then ship it out?

A. Yes.

Q. Now, is the shipping room in the same place as the office there?

A. It is on that same floor.

Q. On the same floor?

A. Yes.

Q. But aren't there some people who run that concern, the owners, the bosses?

A. Yes, sir.

Q. Haven't they got an office?

A. Yes, sir.

Q. When you go over there you go to see them, don't you?

A. Well, I go in through the shipping clerk's——

Q. I didn't ask you that, I asked you, when you go over there you go to see them, don't you?

A. Absolutely. I see them and I see other people also.

[fol. 146] Q. Your purpose in going there is to see the bosses, isn't it? Your business is with them, isn't it?

A. Also with other people. I don't always deal on everything with the bosses. There are different heads of departments.

Q. You have business with the shipping clerk?

A. Not with the shipping clerk but in the department.

Q. Have you anything to do with the shipping clerk or the shipping department?

A. Yes.

Q. What do you have to do with them?

A. Well, when we make deliveries I have to pick up hangers sometimes.

Q. You have to go and get hangers that you deliver over?

A. Where they ship the dresses.

Q. Is it any of your business where they send their stuff?

A. I don't question them. It is none of my business.

Q. Isn't it a fact that the names of their customers is a trade secret of theirs?

A. No, not exactly.

Q. What do you mean by "not exactly?"

A. They don't got no secret from their contractors as far as where they ship the dress because we are not competitors.

Q. But it is not your business to see that the shipments are made properly or any other way?

A. I am not interested in that.

Q. Of course not. And if you go through the shipping office you only walk through to get somewheres else, don't you?

A. Well, sometimes I stop off, as I said before, to pick up [fol. 147] my hangers.

Q. That is all?

A. That is all.

Q. That is your only business in the shipping department?

A. Exactly.

Mr. Falk: That is all.

Mr. Entes: One question, your Honor.

The Court: All right.

Redirect examination.

By Mr. Entes:

Q. How many times a week would you say you go there on an average?

A. About three or four times a week.

Q. And do you say that throughout the year you go three or four times?

A. Yes.

Q. And did you go that amount of times during the period we mentioned?

A. Always like that.

Mr. Entes: That is all.

The Court: You may step down.

(Witness excused.)

Mr. Entes: If your Honor please, I think that rather than make the Court waste any more time and have any further delay I suggest that the Court recess to tomorrow morning; and I will subpoena enough witnesses to have witnesses for two days' trial or three days' trial, and have them here in person. I do not want to request the Court to issue any bench warrants, because I know that some of these people are ill. Even though they have been sub-
[fol. 148] poened, I do not think the Court should take it upon itself to have them arrested and dragged down here, and I think not to waste the time of the Court in having anybody else straggle into the court, it would be to the advantage of the Court to recess until tomorrow morning, and I will make it my duty to emphasize that these men must come down under subpoena.

The Court: I take it, Mr. Falk, you do not want to go ahead with the defendant's case?

Mr. Falk: No, sir. I would like to cooperate in any way, but I can't do it.

The Court: I won't compel you to.

Very well. We will adjourn until 10:30 o'clock tomorrow morning.

(Adjourned to December 16, 1943, 10:30 a. m.)

[fol. 149] SALVATORE GANGI, etc.

vs.

D. A. SCHULTE, INC.

New York, December 16, 1943;
10:30 o'clock a. m.

Trial resumed.

The Court: Put your witness on.

SAMUEL S. BENIS, called as a witness on behalf of the plaintiff, being duly sworn, testified as follows:

Direct examination.

By Mr. Entes:

Q. Mr. Benis, are you an officer of the corporation of Margot Dress, Inc.?

A. Yes.

Q. Located at 490 Seventh Avenue?

A. I am.

Q. And during the period of 1938 to 1942, during this period did you have a contractor by the name of Isidore Chessin, also known as Proper Dress, located at 571 Eighth Avenue in the Borough of Manhattan, City of New York?

A. Part of that time, yes.

Q. And what part of that time?

A. From the early part of 1941 up to the present.

Q. And was Mr. Chessin a contractor for any subsidiary of the Margot Dress prior to 1941?

A. Yes.

Q. What was the name of that subsidiary?

A. Junior Formals, Inc.

[fol. 150] Q. Was that located at the same address as the Margot Dress?

A. Same address.

Q. And what period of time did Mr. Chessin—

The Court: Wait a minute. Will the bailiff ask the gentleman to step outside if he wants to continue his conversation. If you want to remain you will have to remain here quietly.

All right, you may proceed.

Q. Will you please tell the Court what period of time to your best recollection Isidore Chessin was the contractor for Junior Formal Dress?

A. From about 1938 to about the early part of 1941.

Q. Can you state to the Court that Isidore Chessin was a contractor for Formal Dress and Margot Dress for the period of 1938 to the early part of 1942?

A. Yes, approximately.

Q. And you are an officer of both corporations?

A. I am.

Q. And you are familiar with what happens to the merchandise, the dresses of those corporations?

A. I am.

Q. And do you know of your own knowledge how many dresses of your concerns, both concerns, go outside or went outside of the State of New York during that period?

A. No.

Mr. Falk: I object to that question.

[fol. 151] The Court: Objection sustained. Ask him about Chessin's dresses.

Q. Do you know where Chessin's dresses were shipped generally?

Mr. Falk: I object to the question on the ground that it is irrelevant and immaterial.

The Court: I thought you had an exception to that generally.

Mr. Falk: Well, it applies to these manufacturers too, sir, and I want to press it.

The Court: All right, I will give you one for the manufacturers as well.

Mr. Falk: Thank you, sir.

Q. Will you answer my question? Were Chessin's dresses shipped in the City of New York to outside the State of New York, do you know?

A. Distributed throughout.

Q. Throughout the United States?

A. That is right.

Q. Were those different States of the United States?

A. That is right.

Q. Do both of these concerns maintain continuous accounts outside the State of New York whom they supply with dresses? By that I mean——

A. You mean retailers?

Q. Yes, any type of accounts outside the State of New York?

A. Retailers.

[fol. 152] Q. Retailers?

A. Yes.

The Court: You sell to retailers?

The Witness: Yes.

The Court: Direct?

The Witness: Direct.

Q. And they are located all over the United States?

A. That is right.

Q. And what percentage of your business goes to these retailers?

A. Outside——

Mr. Falk: Just a minute. I object to that question.

The Court: Objection sustained.

Q. And during this period of 1938 to 1942 you had these retailers as continuous accounts?

Mr. Falk: Well, now, I object to the period there because the witness has testified that it was only, I believe, since sometime in 1941——

The Court: He had a subsidiary from 1938, and he is familiar with both.

Mr. Entes: And he is an officer of both, sir.

The Court: An officer of both.

Q. These accounts were regular accounts during that period? By that I mean you supplied them continuously, is that so?

A. Seasonal, yes.

Q. I mean through the year.

A. Throughout the year.

[fol. 153] Q. Throughout each year 1938, 1939, 1940?

A. That is hard to say.

Q. I mean, you supplied the different accounts during that time?

A. Yes.

Mr. Entes: That is all.

Cross-examination.

By Mr. Falk:

Q. Mr. Benis, you say that you had two contractors in this building, 571 Eighth Avenue, is that right?

A. One contractor.

Q. One contractor?

A. Yes.

Q. When you say you are an officer of both corporations, what corporations do you refer to?

A. Margot Dress, Inc. as well as Junior Formals, Inc.

Q. Which is the contractor, either of those?

The Court: They are both jobbers.

Q. Both jobbers?

A. We are jobbers.

The Court: Chessin made the dresses for both of them at different periods.

Q. Now, did other contractors make dresses for both of those jobbers?

A. Yes.

Q. How many other contractors?

A. Well, that is hard to say because certain seasonal periods we acquire more.

Q. Did Chessin at any time make all of your dresses for these two jobbing companies?

A. No.

Q. When you say that the goods were distributed around [fol. 154] the United States, what do you mean by that, by the term "distributed"?

A. Shipped by us.

Q. By you?

A. That is right.

Q. But were any dresses that you had made by Chessin sent anywhere except to your place in New York City?

A. They are delivered to us.

Q. They are delivered to you?

A. That is right.

Q. Now, when they are delivered to you and received by you in New York City, are they complete, ready for the consumer?

A. That is correct.

Q. Do they have buttons on?

A. Everything.

Q. Labels?

A. We don't use any labels. We have size tickets, style number.

Q. Do you do anything to them after they come into your place?

A. You mean add any ticket——

Q. Yes.

A. No.

Q. Do you repackage them?

A. Oh yes.

Q. How are they shipped from Chessin over to your place, in boxes, or are they brought on hangers by these pushcarts, or what?

A. Brought on hangars by a pushtruck.

Q. And then they are packed over in the jobber's place of business?

A. That is correct.

Q. You don't really know, do you, Mr. Benis, sitting here this morning, which dresses made by your contractors went to which of your customers around the country?

[fol. 155] A. No.

Mr. Falk: That is all.

Redirect examination.

By Mr. Entes:

Q. Mr. Benis, you do know that Chessin Dress or the other contracting firms' dresses in the overall picture are distributed equally——

Mr. Falk: I object to that question. That is in the nature of cross-examination.

The Court: It is. You may examine and ask him a question, but you can't lead him to that extent. He is your witness.

Q. Is the distribution of the Chessin dresses any different than the distribution of any of your other contracts?

Mr. Falk: I object to that question on the ground that it is irrelevant and immaterial.

Mr. Entes: If your Honor please——

The Court: I will allow it. Go ahead.
Mr. Falk: Exception.

Q. Is the distribution of the dresses of Chessin which Chessin contracted for you any different than the distribution of any of the other contractors who supply you with dresses?

Mr. Falk: I object to the question on the ground that it is irrelevant and immaterial; it is too vague; there has [fol. 156] been no foundation laid: We have no yardstick by which to make the alleged comparison.
The Court: I will let him make the comparison. The answer is yes or no.
The Witness: May I have the question, please?
The Court: Please read it, Mr. Reporter.

Q. (Read.)
A. No.

Mr. Entes: That is all.

Recross-examination.

By Mr. Falk:

Q. Mr. Benis, you said a minute ago that sitting here this morning you really can't tell which dresses made by which contractors ultimately went to which of your consumers; isn't that right?
A. I am only basing it on an overall picture, sir.
Q. Upon an impression, aren't you?
A. Yes.
Q. If it were important for you in connection with your individual welfare and interest to ascertain these facts, you would have to make quite a study of your books, wouldn't you?
A. Definitely.
Q. Definitely?
A. Yes.

Mr. Falk: I move that all the testimony of this witness be stricken out upon the ground that by his own testimony he has asserted that he really does not know about any of these facts.
The Court: Motion denied. It goes to the weight.

[fol. 157] Mr. Falk: Exception.

That is all.

The Court: Step down.

(Witness excused.)

The Court: Call your next witness.

ABRAHAM KAUFMAN, called as a witness on behalf of the plaintiff, being duly sworn, testified as follows:

Direct examination.

By Mr. Entes:

Q. Mr. Kaufman, are you a dress contractor at premises 571 Eighth Avenue, Borough of Manhattan, City of New York?

A. Yes, sir.

Q. And what floor are you on?

A. On the 18th.

The Court: Is that the name of the space in which he is listed in the schedule?

Mr. Entes: I will give your Honor the information in a moment, sir. For the purposes of the record, your Honor I would like to make a little explanation. It seems that there is no 13th floor as far as these tenants are concerned; it is called No. 14, although on this original list they call 14 13; so there is a difference of a floor when we go past the 13th floor. Mr. Kaufman just said he is on the 18th floor. It is called the 17th floor.

The Court: But it is listed under the name of Abraham [fol. 158] Kaufman?

Mr. Entes: Yes.

The Court: All right.

Q. Mr. Kaufman, you and your wife conducted a dress contracting business from February 1st, 1940 to the present time on the 18th floor?

A. Yes.

Q. And did you occupy the entire 18th floor?

A. Yes.

Q. How much of the floor do you occupy?

A. Well——

Q. A half? A quarter?

A. No; more than a quarter, about a third of the floor.

Q. About a third of the floor?

A. Yes.

Q. Now, I am only interested in the period of February 1, 1940, when you went on the premises, to February 5, 1942. During that period were you a dress contractor?

A. Yes.

Q. And whom did you contract dresses for?

A. Blue Gem Dresses.

Q. Where are they located?

A. 501 Seventh Avenue.

Q. And you delivered these dresses to the Blue Gem?

A. Right.

Q. Do you know what Blue Gem does? Do you know how the Blue Gem distributed these dresses, to your own knowledge?

A. Yes, sure.

The Court: How do you know?

The Witness: Because my own brother—I know what [fol. 159] he does with the dresses.

The Court: You mean he told you?

The Witness: Yes. Sure he told me because he is my own brother.

Q. Did you visit the place of Blue Gem frequently during that time?

A. Almost every day; twice a day.

Q. Did you at any time see people putting your dresses in packages?

A. Yes, sure.

Q. Did you see the addresses on the packages?

A. Yes.

Q. And were these dresses for accounts outside of the State of New York?

A. Only outside of New York. They are only shipping outside of New York. They don't sell any to New York City.

Mr. Entes: That is all.

Cross-examination.

By Mr. Falk:

Q. Mr. Kaufman, who owns this Blue Gem Company?
A. Mr. Morris Kaufman.
Q. Your brother?
A. Yes, sir.
Q. Do you make all the dresses that he sells or does he have other contractors as well as you?
A. He has got another contractor, also my brother. It is a family affair.
Q. And do you and this second brother you just mentioned act as the sole contractors for the brother who operates the Blue Gem?
A. Yes.
Q. Now, when you are over at your brother's place of [fol. 160] business, what do you go there for? What do you go to the jobber for?
A. Well, I go because I have to be there——
Q. For what purpose?
A. I have to O. K. dresses.
Q. Do you have an interest in Blue Gem yourself?
A. Well, this is not exactly an interest, but if the firm makes money, they just give me a present every year, a couple of thousand dollars, something like that. My own brother. It is just like an interest, a general agreement.
Q. Is it the kind of an interest that is part of your income tax? Is it in your income tax return?
A. It is not exactly income—this I don't know.
Q. Do you include what you receive from Blue Gem in your income tax return?
A. Yes, everything I suppose.
Q. What do you mean you suppose?
A. My accountant takes care of those things.
Q. Will you answer my question whether or not you have an interest in Blue Gem?

Mr. Entes: If your Honor please, I think he is going into irrelevant and immaterial matters.

The Court: He is trying to challenge this man's credibility.

Mr. Entes: All right, if your Honor wishes it.

The Court: I will only allow him to go a very limited [fol. 161] distance in that direction. We are not going to try the issues of that case here.

Q. Have you an interest in Blue Gem?

A. Well, I got an interest, yes.

Q. Now, when you go over there do you go over to deliver your goods?

A. No, I ship it by boy by these pushcarts, by these pushtrucks.

Q. But you go there twice a day?

A. Twice a day; sometimes three times a day; sometimes four times a day.

Q. And you see your goods wrapped up, is that right?

A. Yes, in boxes.

Q. Do you stand there and watch them being wrapped up?

A. Not exactly. They have got shipping boys all over the place and I see what they do.

Q. Now, when Mr. Entes asked you first whether you saw them being packed and then whether you saw the dresses, you answered yes to both questions.

A. Yes.

Q. Now, are the addresses affixed to any paper or to the markings before the goods are packaged or afterwards?

A. Well, they are picking up orders, 20 or 30 or 50 of a style and they are putting on slips wherever they have to go, and then they give it to the boy and put them in the boxes and put in the dresses and send them away.

Q. Isn't it a fact that the order is just as you have stated; that they are packed in boxes and after they are [fol. 162] packed and closed the last thing they do is put the address on the outside?

A. That is right, write in the box; on the top of the box.

Q. Do you tell this Court that when you are over there you stand and watch these goods packed and you wait right at the box until you see what address is put on?

A. No, I didn't say so.

Q. Isn't what you mean that you see some of your goods being packed and then you see other closed boxes standing around, addressed, ready to go out; isn't that what you really see?

A. I don't understand the question.

Q. Well, let me try it again. Isn't what you see over there at Blue Gem some of your goods being put in boxes? Right?

A. Yes, sir.

Q. And also some closed boxes or packages addressed ready to go out?

A. Yes, the same dresses.

Q. How do you know they are the same dresses?

A. Because I know they don't pack only mine——

Q. But they pack other brothers' dresses?

A. The same dresses. We work almost on practically the same styles.

Q. You know only what your brother tells you about where your dresses go, don't you?

A. Well, I know it, yes. As a matter of fact, I know where dresses are shipped. They don't sell any other clothes, only dresses.

Q. Does your brother at Blue Gem sell any people in [fol. 163] New York State?

A. I don't think so.

Q. What?

A. I don't think so.

Q. You don't know, though?

A. No, I don't think so.

Q. You would not be prepared to tell this Court that Blue Gem does not sell to anybody in New York State, would you?

A. I don't think so. As a matter of fact——

By the Court:

Q. Does he sell to anybody in Albany?

A. Pardon me?

Q. Does he sell to anybody in Albany?

A. All over the United States.

Q. Syracuse?

A. Yes.

Q. Rochester?

A. Yes.

Q. Buffalo?

A. California too.

Q. I am asking you about the cities I mentioned. Binghamton, Elmira?

A. Yes.

Q. Jamestown?

A. Yes. All over the United States, because there came out a question a couple of years ago they don't want to sell any dresses or——

The Court: Don't bother with that.

By Mr. Falk:

Q. Mr. Witness, when you testified about dresses being shipped out of New York State, have you got in mind that all these various places that the Judge has just mentioned happened to be in New York State? Did you stop to think of that?

A. In New York State?

[fol. 164] Q. Do you know that Albany is in New York State?

A. Yes, I know Albany is in New York State, naturally.

Q. Do you know that goods sent to Albany, Buffalo, Syracuse, Rochester, Jamestown and all those places are in New York State?

A. Well——

Q. Do you know that? Yes or no, please.

A. Yes, I know that. We send them all over the United States: that is what I said. Out of the State.

Q. You seem very eager to establish the fact Blue Gem was engaged in interstate business. What is your reason for being so eager?

A. There is not a reason because I know he is selling all over the United States. That is all the reason.

Q. How long have you known Mr. Gangi?

A. Which Gangi?

Q. The gentleman you have been chatting with over here in the court (indicating).

A. Since I am in the building.

Q. You know him pretty well, don't you?

A. I know all the elevator boys what they are working over there.

Q. You knew his name, didn't you?

A. I really didn't know his name. We would call him by a nickname, Chickie. Everybody called him Chickie.

Q. And you know that those people are going to continue to be in the building, don't you?

A. This I don't know.

[fol. 165] Q. That they are there now, aren't they?

A. Yes.

Q. Have you ever had any labor trouble yourself?

A. No.

Q. Have you got a union in your shop?

A. A hundred per cent union.

Q. You know that the Schulte Company isn't the owner of the building any more, do you?

Mr. Entes: I object, your Honor; irrelevant and immaterial.

The Court: Objection sustained.

Mr. Falk: Exception. I think we are entitled to show the bias here.

The Court: Well, within reason I will let you go ahead, but what has the last question got to do with it?

Mr. Falk: I want to show that he does not care any more about the way Schulte may feel, that is, about the way Schulte may feel about his testimony, but he is very much concerned about the way the people who are still in the building may feel——

The Court: I thought you had developed that. However, I will let you put the last question.

By the Court:

Q. Do you know that Schulte is out of the building?

A. Yes, they sent me a letter.

[fol. 166] Q. You know that?

A. Yes.

Mr. Falk: That is all.

The Court: All right. You may step down.

Mr. Entes: One question, sir.

The Court: All right.

Redirect examination.

By Mr. Entes:

Q. Do you see the original account orders of your brother at Blue Gem, the original orders?

A. Sometimes yes and sometimes no.

Q. And when you testified that the goods are sent all over the United States, do you mean cities like Chicago, St. Louis, Los Angeles and other cities such as that?

A. Yes; I know he ships in California.

Mr. Falk: I object to the question and move that the answer be stricken out unless it is definitely connected with the merchandise made by this fellow.

The Court: All right. It is already in. Its weight will be given consideration.

Mr. Entes: All right.

The Court: You may step down.

(Witness excused.)

[fol. 167] MAX SCHNEIDER, called as a witness on behalf of the plaintiff, being duly sworn, testified as follows:

Mr. Entes: For the Court's information, Mr. Max Schneider was on the northeast unit on the 16th floor. I think they call it the 17th, but it is 16th here.

The Court: But he is listed as what, Max Schneider?

Mr. Entes: Yes. And the period there is 2/1/35 to 1/21/42.

Direct examination.

By Mr. Entes:

Q. Mr. Schneider, did you have a place of business on the northeast unit on the 16th floor of 571 Eighth Avenue, in the Borough of Manhattan, City of New York——

A. I did.

Mr. Entes: One moment. Let me finish the question.

Q. —during the period from October 24, 1938 to January 21, 1942?

A. Not——

Q. I mean——

A. I was out of there in January.

Q. In January of 1942?

A. That is right. I was out in 1941, I believe, in January.

The Court: January 1941?

The Witness: Yes, sir.

Mr. Entes: The record here shows January 1942.

[fol. 168] Q. Are you sure of that?

A. Because I am in these premises for the past almost two years now.

Q. January will put you into 1942. January 1944, if you went back two years would bring you back to 1942.
A. That is correct.
Q. Then 1942 is the correct date?
A. Yes.
Q. What was your business at that time?
A. Dress contractor.
Q. And whom did you contract for?
A. C. H. D. Robbins Company.

The Court: Located where?
The Witness: 525 Seventh Avenue.

Q. Do you know where the dresses were shipped from C. H. D. Robbins Company?
A. From C. H. D. Robbins?
Q. Yes.
A. I do not.

Mr. Entes: That is all.
Mr. Falk: No questions.
Mr. Entes: One moment. One other question, please.

Q. Mr. Schneider, did you contract exclusively for C. H. D. Robbins?
A. Exclusively.

Mr. Entes: Thank you.

(Witness excused.)

[fol. 169] MARTIN GOLDEN, called as a witness on behalf of the plaintiff, being duly sworn, testified as follows:

Direct examination.

By Mr. Entes:

Q. What floor are you on?
A. 7th.
Q. 7th floor?
A. 7th floor.

The Court: What is the name of your business?
Mr. Entes: Columbia Belt Company, Inc., your Honor, north unit, 7th floor, period 2/1/41 to the present time.

Q. Mr. Golden, are you an officer of the Columbia Belt Company, Inc.?

A. Yes.

Q. And were you such an officer for the period from February 1, 1941 to February 5, 1942?

A. Yes.

Q. Were you familiar with the business of the Columbia Belt Company during that period?

A. Yes.

Q. Will you please tell the Court what type of business you had at that time?

A. We manufactured belts that go on dresses. We ship the belts to jobbers who put them on the dresses and ship them out of town.

Mr. Falk: I move that that last part be stricken.

The Court: The latter part will be stricken, until it is developed that he is qualified to testify.

Q. Do you do any repair work?

A. Occasionally we get back some belts from different [fol. 170] customers. They send them direct to us and we reship them.

Q. And these accounts—whose accounts are they? Your accounts or the accounts of the jobbers you do work for?

A. They are the accounts of the jobbers.

Q. And these customers ship the belts directly back to you?

A. Yes, with the communication that I should put a style number on there so I should know what type of belt they want.

Q. Are these accounts accounts outside the State of New York?

A. Yes.

Q. And were these accounts in different States of the Union?

A. That is right.

Q. I am only talking of the period from 1941 to 1942.

A. That is right.

Q. And did you buy merchandise from outside of the State of New York during that period?

A. No.

Q. The merchandise you got from this metropolitan area?

A. Yes.

Q. Did you get any merchandise at all from outside of the State of New York?

A. Yes, a little.

Q. What type of merchandise?

A. Buckles.

Q. Buckles?

A. Yes.

Q. And where do they come from?

A. They come from the State of New York, North & Judd Manufacturing Company.

Q. Did this concern supply you with buckles throughout [fol. 171] that entire period?

A. Yes.

Mr. Falk: If your Honor please, I did not get a chance before the answer was given, but I want to raise an objection that may be fairly general in its implication, and that is that we take the position on a line largely in that Court of Appeals decision in the First National Bank case that the test here is not whether they were engaged in interstate commerce but in the production of goods for interstate commerce. Therefore it would not make any difference where he got these buckles; and I move that on that point all the testimony be stricken out on that ground.

The Court: Are you referring to the Stoike case?

Mr. Falk: Yes.

Mr. Entes: May I say something, your Honor?

The Court: Yes, of course.

Mr. Entes: For the purpose of the record, the Stoike case was a case involving office employees.

The Court: It involved a bank.

Mr. Entes: It involved a bank.

Mr. Falk: But the basic point, sir, is this, and I will state it briefly now because I will have to sometime during the case. The Act draws a distinction between interstate commerce as you well know——

[fol. 172] The Court: No question about it.

Mr. Falk: —and production of goods in interstate commerce. Now, receipt of buckles from Connecticut may be interstate commerce but it certainly has nothing to do with the production at 571 Eighth Avenue of goods for interstate commerce; and for that reason I move to strike out all the testimony relating to these buckles.

Mr. Entes: If your Honor please, the merchandise being received from outside the State of New York goes into the production of goods which we are trying to connect up to show that these goods eventually go outside the State of New York.

The Court: Well, if it does not go out of the State of New York, and assuming it does not go out of the State, and the purchases were made outside, would that help you any?

Mr. Entes: I think the Court is well aware that that by itself does not.

The Court: If you do establish that the goods go outside the State, does it make any difference where the materials originate?

Mr. Entes: I think it is material that a shipment of goods for the purpose of production—I think it is necessary to show the different links in production. I think counsel [fol. 173] for the defendant confused the Stoike case with the Arsenal Building case in this manner; The Stoike case makes a clear distinction between the type of buildings——

The Court: What do you mean the type of buildings? The Stoike case emphasizes the distinction between production of goods in interstate commerce and interstate commerce. And the fact that production of goods for commerce, employees who are necessary are included, whereas in cases involving a commerce, a closer degree of connection is required by the statute. That is all the Stoike case is, and you need not concern yourself here. This problem is not governed by the Stoike case in any sense except the establishment of the distinction between commerce and the production of goods for commerce.

Mr. Entes: If your Honor please, all the testimony adduced so far has attempted to show that there is production of goods.

The Court: Yes, and referring to the question of the origin of the raw materials——

Mr. Entes: Now, the belts are processed—I mean the buckles are processed, and I think it has some material effect on the fact that it was being changed when it comes into interstate commerce, and I think it may have some bearing.

[fol. 174] The Court: Frankly I have some doubt about it, but I will let it go in as under the rules it would be permitted

to go in, and I will reserve decision on that question and I will allow you to move to strike out at a later time.

Mr. Falk: I should like to say that while I referred to the Stoike case, I do not think you need any judicial decision, because I think the Act itself on that point is so clear.

The Court: Very.

Mr. Entes: Weill the stenographer read the last question and answer, please.

(Last question and answer read.)

Q. Mr. Golden, what do you do with the buckles?
A. We put them on the belts and finish them.
Q. Then you sell the belt?
A. We ship the belt to the customers and they——

The Court: Never mind what they do until you are asked the question.

Q. Do you know what the customers do with the dresses with the belts on them?
A. They ship them.

The Court: Now, Mr. Witness, will you observe this rule; When you are asked a question, do you know, the answer is either yes or no.

The Witness: Yes.

[fol. 175] The Court: It is not the answer to the question about which you are asked. Now, observe the questions and answer them only to the extent they are put to you. Otherwise we will get our record all mixed up.

The Witness: Yes.

Q. Do you know? Where are they shipped?

Mr. Falk: Just a moment. I did not hear an answer to that first question.

The Court: This man has nothing to do with dresses. He manufactures belts. That is what happens when you let witnesses run away. Now, you must keep a rein on him, counsel, and don't let him get out of control.

Mr. Entes: We are not going to confuse the issue.

The Court: Very well.

Q. Do you know where the dresses with your belts on are shipped——

Mr. Falk: I object.

The Court: Sustained.

Q. Do you know where the belts and buckles are shipped to?

The Court: By him or by others?
Mr. Entes: By others he does the work for.

A. Yes.
Q. Where are they shipped?

[fol. 176] Mr. Falk: I object.
The Court: Objection sustained. You will have to establish first observation and opportunity to know.
Mr. Entes: I will strike that out.

Q. Whom do you ship your belts and buckles to?
A. The names of the concerns?
Q. Yes.
A. Berell Frocks, 501 Seventh Avenue, New York City.
Q. Who else?
A. Biberman Bros., 15 Mount Vernon Street, Philadelphia, Pennsylvania.
Q. Any others?
A. Lombardi Dresses, 134 West 37th Street.

The Court: Are these your only customers?
The Witness: I have some more, but the bulk of the business is with those three.

Q. Just for the sake of the record, did those three customers handle the bulk of your business during the period in question? The period is February 1, 1941 to February 5, 1942. Is that correct?
A. Yes.
Q. Now, you testified a short while ago that when the belts are defective, customers of the accounts of these customers you ship to send the belts back to you direct.
A. They send them to the jobber with their letter.
Q. And do you see the letter?
A. Yes.
Q. And does the letter instruct you on what is defective [fol. 177] in the belts and buckles?
A. It instructs the style number so I can determine what belt I made for them.
Q. And tell you what to do with the belt?
A. Either replace or repair.

Q. And are these accounts from their letterheads accounts outside the State of New York?

A. Yes.

Mr. Falk: I object.

The Court: Objection sustained. It is getting pretty remote.

Q. When you make these belts, do you ship them direct to your accounts or do you ship them back to your jobber?

A. I ship them sometimes to the jobber and sometimes direct.

Q. You ship the belts direct?

A. Sometimes direct, not always.

Q. And when you ship them direct, are these accounts outside the State of New York?

Mr. Falk: I object to the question on the ground that it is irrelevant and immaterial; there has been no connection at all. As a matter of fact, the witness testified before that when these belts were defective they were shipped to the jobber——

The Court: Mr. Entes, didn't he testify that certain of his accounts were in Philadelphia?

Mr. Entes: Yes.

[fol. 178] The Court: What more do you want? Why don't you develop that? Anything else is either futile or surplusage.

Mr. Entes: May I say something to your Honor?

The Court: Certainly.

Mr. Entes: Here is a point I may wish to develop. A lot of the accounts for his jobbers send the belts back to be fixed or repaired and so forth, to his place, on their letterhead. He sometimes, as he testified, ships the belts direct to the account outside the State of New York. Now, if he processed these belts and shipped them outside the State of New York, even for his jobber or on behalf of his jobber, he is producing goods in interstate commerce; and furthermore since he ships it himself, he himself knows of his own knowledge that they are going outside the State of New York. This is not far-fetched testimony on what he thinks or what he heard. This is what he actually knows.

The Court: We have that much on the record, haven't we? That he repairs belts; that he ships them sometimes

to customers of his customers who are outside the State of New York.

Mr. Entes: Yes.

Q. And your account in Philadelphia, Pennsylvania, was [fol. 179] a steady account during that time; you made continuous shipments to them?

A. For a period of time.

Q. I am talking of the period from February 1, 1941, to February 1942.

A. There was no steady account.

Q. By "steady account," I mean you shipped during the year.

A. No.

Q. Was it an isolated account?

A. Yes.

Q. Did you make just one shipment or many shipments?

A. A few shipments.

Q. And do you have any other accounts other than Biberman Bros. outside the State of New York?

A. No.

Q. And between the three accounts, Berell Dress Company, Lombardi Dress Company and Biberman Bros., they comprise, as you testified, the bulk of your business, is that so?

A. That is right.

Q. Do you ever visit Berell Dress Company or Lombardi Dress Company?

A. Yes, many times.

Q. How frequently do you visit those places?

A. At least once a day.

The Court: Now, before you go into that last, I suppose you are going to try to trace what happens to the belts after they are put on dresses. Now, isn't there some point where these things come to rest?

Mr. Entes: The things come to rest if we had a finished product, an independent sale. For instance, your Honor, if [fol. 180] a manufacturer made a dress with a pocket, say, in the dress and somebody else in New York City made a handkerchief which happened to be a fancy handkerchief, and some individual will make a sale outside the State of New York and put a handkerchief in it, that is no processing of the dress——

The Court: Supposing he were a contractor and was given a style to put handkerchiefs in the pockets of the dresses; does that mean that a local dress manufacturer who sells to anybody except in the State of New York is engaged in interstate commerce?

Mr. Entes: No. Here is where a line is drawn——

The Court: He is a belt manufacturer.

Mr. Entes: But a belt manufacturer is an inseparable part of the dress. That is, the belt is an inseparable part of the dress.

The Court: I will ask the witness this question:

By the Court:

Q. Is it made of the same material as the dress?

A. Yes.

Q. You get your material from the customer?

A. Yes.

Q. So you are really a belt contractor?

A. That is right.

Mr. Entes: Is that clear?

The Court: It is a trimming on the dress.

[fol. 181] Mr. Entes: It is a component part of it. It is an inseparable part. It is not an additional ornament.

The Court: All right.

Mr. Entes: That is the thing we wish to establish.

The Court: You did not develop it fully. I thought these were just leather belts.

Mr. Falk: I think he is confronted by the dilemma that if these belts are attached so to the dress, that they become a part of the whole dress, and if they are not attached, then they are completely separate articles, as your Honor surmised.

The Court: They are not attached any more than a pair of pants is attached to a coat, but they are part of a suit of clothes. You may develop the point.

By Mr. Entes:

Q. The merchandise you get for the belts,—are they purchased by you or do you receive them from the dress contractor, the belts you have to make for the dress contractor?

A. Well, I get part from the dress contractor and the other part that I supply I purchase.

Q. The part you get from the manufacturer,—what part of that is the belt?

A. The fabric that matches the dress.

Q. Does the fabric match exactly the dress?

A. Yes.

[fol. 182] Q. Can you substitute another fabric of this kind in that place?

A. No.

Q. Do you know whether or not the dress is complete without your belt?

A. I don't know that.

The Court: All right, you may pass along that point. Now, do you want to establish that he knows that these dresses go outside the State?

Mr. Entes: I do not know if he does or not. I will ask him the question:

Q. Do you know if these dresses go outside the State of New York?

A. Yes.

By the Court:

Q. You do know?

A. Yes.

Q. Tell us how you know.

A. Berell Dress—I am the only manufacturer who works for him, and many times I deliver belts there, and they are in a hurry for specials, and I see the boxes all ready and the dress is waiting, and I see them marked up right on the package.

Q. And you see them go outside the State of New York?

A. Yes, different cities, Pittsburgh, Boston, San Francisco.

The Court: All right.

By Mr. Entes:

Q. How frequently do you go to Berell?

A. At least once a day.

Q. And how does that compare with the other con-

[fol. 183] tractors? Do you have the same experience with the other dress contractor?

A. Yes.

Q. How frequently do you go there?
A. At least once a day.

Mr. Entes: That is all.

Cross-examination.

By Mr. Falk:

Q. Mr. Golden, you testified that some of these defective belts are sent back by the customers to the jobber.
A. That is right.
Q. And of those some of them are sent—are their customers outside of the State of New York?
A. That is right.
Q. And of those, some of them are shipped by you then direct to those people, isn't that right?
A. That is right.
Q. Now, how many defective belts do you make?
A. We don't make defective belts.
Q. What percentage of the belts that you turn out is defective?
A. All belts are perfect, but in the handling of them, the women, when they look at the dresses, when they put them on or take off the dress, they rip the belt or the rip the buckle attached to it, and they send it back to us to be repaired or to be replaced.
Q. You used the word "defective," sir. What percentage of the belts that you turn out are returned to you as defec [fol. 184] tive, to use your own terminology?
A. Small percentage.
Q. How small?
A. Less than 5 per cent.
Q. How much less? Is it less than 1 per cent?
A. No.
Q. Do you know Mr. Wise who is sitting at the counsel table here?
A. Yes, I do.
Q. What office do you hold in your company?
A. President of the company.
Q. Have you got another gentleman there who is an officer whom you might informally speak of as a partner?
A. Yes.
Q. What is his name?
A. Infeld.

Mr. Entes: If your Honor please, I do not think for the purposes of the record he should address another officer of the corporation as informally a partner. For an attorney to state that is an improper use of language.

Mr. Falk: I withdraw that. I am just trying to save time.

The Court: They are incorporated partners.

Mr. Falk: They always talk of one another as partners, that is all.

Q. Do you recall that Mr. Wise came to you and asked you for information as to the kind of business that you were doing, the very subject matter of your testimony this [fol. 185] morning, and that you refused to give it to him?

A. Yes.

Mr. Entes: If your Honor please, we have no objection to his question if he will place the time and place that Mr. Wise spoke to him.

Mr. Falk: The witness can tell us that.

The Court: That will be the next question. The question was, was there such a conversation, and the answer is yes.

The Witness: Yes, there was a conversation.

Q. When did the conversation take place?

A. I do not know the exact date.

Q. Well, about?

A. A few months ago.

Q. What did Mr. Wise say to you and what did you say to him?

A. Mr. Wise said to me, "Do you do any business out of the State of New York?" I said, "A little bit business out of the State of New York. Most of it I sell in New York City, but the merchandise I know is shipped out of town."

He asked me to sign that I do no business out of the State of New York.

Q. Didn't you refuse to give Mr. Wise the very information about which you have testified here this morning?

A. I gave him the same information I am giving you now.

Q. That is your testimony, that you gave it to Mr. Wise? [fol. 186] A. That is right.

Q. So if Mr. Wise were to testify that he asked you for that information and that you point blank refused to give it to him, that would not change your recollection?

A. No.

Q. When did you first talk to Mr. Entes or someone else on behalf of the plaintiff?

A. Well, I believe this week.

Q. Whom did you speak to?

A. I do not know his name.

Q. Mr. Gangi, the gentleman sitting over there at the end of the first row?

A. That is right. I mean—I don't have very much to say with him; he just—I just get in the elevator and call my floor. I don't know him very well.

Q. Were you subpoenaed to come here this morning?

A. Yes.

Q. Did you discuss the testimony with anybody else?

A. I didn't discuss the testimony. I spoke to this gentleman you just mentioned.

Q. What did you tell him?

A. Well, I told him I would like to get through with my duties as soon as I can and go back to my business.

Q. Did you talk to him about the nature of your business and where the merchandise was shipped?

A. No, I never discussed that with him.

[fol. 187] Q. Now, this Pennsylvania account that you testified about you say consisted of just a few transactions, is that right?

A. That is right.

Q. Did you consult your books to find out just how many — those transactions were and when they took place?

A. Yes.

Q. Now, when did they take place?

A. I haven't——

Q. Did you make a memorandum of it?

A. Yes.

Q. Will you please tell us what is on that memorandum?

A. Yes. January 7 or 15, 1941, I did a total of $376.07 worth of business with Biberman Bros.——

The Court: What date did you give?

The Witness: January 7.

The Court: Where were you located on January 7?

Mr. Entes: What year?

The Witness: 1941.

The Court: Where were you located on January 7, 1941?

The Witness: 571 Eighth Avenue.

The Court: I thought you moved in on February 1, 1941.

Mr. Entes: That is what the records indicate.

The Court: What place of business were you in before?

The Witness: 323 West 38th Street.

[fol. 188] The Court: Is it possible that you did this account from that place?

The Witness: It is possible.

The Court: All right, go ahead.

Q. Did you ever send any goods to this Biberman concern in Philadelphia from 571 Eighth Avenue? Yes or no, please?

A. No. Now that I have the date fixed, no.

Mr. Falk: That is all.

Mr. Entes: One minute, Mr. Golden.

Redirect examination

By Mr. Entes:

Q. Mr. Golden, when you spoke to Mr. Wise did he have a prepared statement for you to sign?

A. He had some sort of a paper. I do not know whether——

Q. Did he have writing on the paper?

A. I didn't look at the paper.

Q. Was it a blank sheet of paper or was something written on it?

A. I really couldn't tell you whether it was blank or not. He spoke to me and had some sort of paper in his hand and I didn't look at it.

Q. And he asked you to sign a statement that you do no business outside of the State of New York?

A. I believe he did.

Q. And you refused to sign that?

A. I believe so.

Mr. Entes: That is all.

Mr. Falk: Just a minute, Mr. Golden.

[fol. 189] Recross-examination.

By Mr. Falk:

Q. This conversation took place prior to September 1942, didn't it?

A. I am not certain of the date.

Q. You are sure you did not read that piece of paper?

A. I don't believe I read it after he——

Q. Are you sure Mr. Wise asked you to sign any paper?

A. Well, he spoke something to me about signing something and he had something in his hand, but I am not certain about what it was, whether it was a statement or not.

Q. Didn't Mr. Wise ask you the nature of your business with respect to where you shipped your belts; isn't that right?

A. Yes.

Q. Isn't that what he asked you?

A. That is right.

Q. And didn't you tell him that you declined to give him any information? Yes or no, please.

A. I gave him the information I gave here, that I shipped to jobbers in New York City.

Q. Did you tell him that you shipped anything to Pennsylvania?

A. No, I didn't.

Q. When did you think of that?

A. I thought of that a couple of days ago when I was subpoenaed as a witness.

Q. You were trying to help the plaintiffs in every conceivable way you could, weren't you?

A. Well, naturally I would like to help him.

[fol. 190] Q. Didn't you know when you gave that testimony that you shipped that stuff from another place of business? Yes or no?

A. No, I wasn't sure of the day I moved in, the exact time I moved into the building.

Q. You testified about it, though——

A. I testified about the sale of this merchandise.

Q. You testified about when you moved into this place of business, didn't you?

A. No.

Q. When did you move in?

A. Well, it is evident that I moved in the month I testified that I shipped this merchandise. I didn't know that.

Mr. Falk: That is all.

Mr. Entes: That is all.

(Witness excused.)

[fol. 191] ABRAHAM RIBACK, called as a witness on behalf of plaintiff, being first duly sworn, testified as follows:

Mr. Entes: For the Court's convenience, this is the Riback Trimming Corporation, northeast unit, 19th floor. They call it the 20th. The period is 2/15/40 to the present time.

Direct examination.

By Mr. Entes:

Q. Mr. Riback, are you an officer of the Riback Trimming Corporation?

A. Yes, sir.

Q. And what officer are you?

A. President.

Q. And did the Riback Trimming Corporation conduct its business in the northeast unit of the 19th floor from February 15, 1940, to February 5, 1942, during that period?

A. Yes. I know I got in there in 1940.

Q. And you are still there, is that so?

A. I am still there.

Q. What was the nature of the business of the Riback Trimming Corporation during that period?

A. We sell braids and trimmings, dress trimmings, and braids of all descriptions.

Q. Do you manufacture or produce anything?

A. We manufacture some.

Q. Some what?

A. Some of the trimmings.

Q. And some braids, too?

A. No, no braids.

[fol. 192] Q. Do you manufacture some of the trimmings?

A. Yes.

Q. I wish you would confine yourself just during that period, not to the present time. During that period did you do any business outside the State of New York?

Mr. Falk: I object to the question on the ground that it is incompetent.

The Court: The objection is well taken. That is not the way to phrase a question of that kind.

To whom do you sell?

Q. Whom did you sell during that period?

A. We sold the cut up trade mostly. We used to sell a

whole lot to the department stores. We sold most of it to the cut up trade and most of it in the State of New York, and I might say——

The Court: What is the cut-up trade?

The Witness: The dress industry, coat and suit industry. We sold them braids for their garments.

Q. Mr. Riback: I want to try to confine yourself to the period between 1940 and 1942.

The Court: February 15, 1940, to February 5, 1942.

Q. During that two-year period were any of your customers—where were your customers located?

Mr. Falk: I object to that question on the ground that it is irrelevant and immaterial. I do not care where they are located. It is where he shipped the goods.

[fol. 193] Q. Who were your customers?

A. Well, we have customers—the most of them are in New York City, but we ship all over the United States as far as that is concerned from time to time.

Q. And are these accounts outside the State of New York in different states of the Union?

A. Yes.

Q. And do you ship directly from your premises to these accounts?

A. Yes, sir.

Q. And did you have those accounts continuously during that two-year period?

A. Well, we always had them more or less. Some seasons they don't buy anything of our products, because it does not fit in, and other seasons they do.

Q. And you sell the trimmings that you produce on the premises?

A. Some of those trimtnings, sure.

Q. Mr. Riback, do you know what percentage or what proportion of the business went outside the State of New York?

A. Well, I might——

Mr. Falk: What period?

Q. During the period mentioned, February 15, 1940, to February 5, 1942.

A. Well, I would judge it is about 20, 25 per cent.

Q. That is your best recollection, is that so?

A. That is my best recollection.

Q. You were served with a subpoena in this action?

[fol. 194] A. Yes, I was.

Q. And was the subpoena served by myself?

A. Yes.

Q. And did you ever see me or speak to me before the service of the subpoena?

A. No.

Mr. Entes: That is all.

Cross-examination.

By Mr. Falk:

Q. Mr. Riback, when you say 25 per cent, are you speaking in volume or in value of merchandise?

A. Well, I am speaking in dollars and cents more or less when I speak of 25 per cent. I would not know how to say it otherwise.

Q. Am I correct in my understanding from your testimony that there have been periods when, such as for example, the present time, when you have sold almost all of your merchandise in the State of New York, shipped it to the State of New York?

Mr. Entes: I object to that question; irrelevant and immaterial, and due to the fact that he is discussing a period other than the period in question.

The Court: Objection overruled. Go ahead.

A. What is the question.

Q. Have there been periods when you sold and shipped almost all of your merchandise within the State of New York?

A. No; because we shipped all the time, year in and year out, generally all over the country, more or less.

[fol. 195] Q. More or less?

A. Yes.

Q. Have there been periods when the "less" was very slight indeed outside the State of New York?

A. Well, most of our business is done in the City of New York.

Q. That is what I am asking you.

A. Yes, most of it is done in the City of New York.

Q. And most of it is shipped in the City of New York?
A. Yes.

Q. Is that true during the period of two years that plaintiff's counsel has just asked you about?

A. About what?

Q. Is it true that during that period of time you shipped most of your materials to the City of New York?

A. Yes, sure. I made a statement I ship about 20, 25 per cent of my material outside the State of New York.

Q. Did you consult your books and records before you came down here?

A. I did not consult anything because I did not know I was going to be called even.

Q. So that your figure of 25 per cent is purely guesswork, isn't it?

A. Well, it is not guesswork. I know we do business all over the country, and I am sure that my business in the City or in New York is 75 per cent at least.

Q. At least?

A. At least; and I figure the other 25 per cent was out of the State of New York.

Q. When you say 75 per cent at least, you mean it might [fol. 196] be more than 75 per cent, is that it?

A. It might be.

Q. If you took the time and trouble to go back over your records for the two-year period in question, you might find that your business inside the City of New York, by which I mean specifically the goods shipped by you to the City of New York, was much more than 75 per cent; it is possible, isn't it?

A. It is possible. Send your accountants down or your bookkeeper.

Q. No; I am just asking you these questions. I am not arguing with you.

A. I can't give you any definite answer on that. I know we do a certain amount of business outside the State of New York, and all over the country. I figure it ran at that time about 25 per cent. If you asked me today, it runs about 50 per cent.

Q. Mr. Wise, who is seated here at the counsel table—you know him, don't you?

A. Yes.

Q. He spoke to you a short time ago about the places where your shipments go; do you recall?

A. I don't recall that. I don't think he was in to see me at all.

Q. We have made a concession on our record that to the best of our information about 5 per cent of your shipments go outside the State of New York. Isn't it possible that if you went back and made a tabulation of your figures for the two-year period in question, you would find that was correct?

[fol. 197] Mr. Entes: If your Honor, please, I object to this on this ground. He said we made a concession that the business was 5 per cent. The plaintiff's attorney and the plaintiffs have never conceded the business was 5 per cent.

Mr. Falk: Yes, we did, at the time we read off those names?

The Court: Yes, he was willing to concede 5 per cent and you rejected it, Mr. Entes.

Mr. Entes: He said he was willing to concede. He is implying that the plaintiffs did.

The Court: No. He says, "we", meaning himself.

Mr. Falk: You understand the question, Mr. Witness?

The Witness: I can tell you this much; I am not interested in this case at all. I was just called here and they asked me whether I did interstate business and I said I do interstate business, and I was called, and that is all I know. And I know it is fair to both that I do more than 5 per cent outside the City of New York. That is all.

Q. You are talking now about "do" in the present tense, or during this two-year period?

A. The two-year period. If you asked me now, I would tell you it is 50 per cent.

Q. You would tell me anything, 25 per cent, 50 per cent——

The Court: No. The question was not susceptible to [fol. 198] that answer.

We will take a short recess.

(Short recess.)

Mr. Entes: Mr. Riback, please resume the stand.

By Mr. Falk:

Q. Mr. Riback, will you explain to the Court just what the business is that you conduct on your premises and you did conduct during the period of time in question.

A. Well, I do, generally speaking, I job some stuff, sell it to the dress industry and to the department stores——

Q. Now, by that do you mean that you buy certain material and sell it in the same form in which you buy it?

A. That is right.

Q. That you do not process it at your place?

A. I do process some of it.

Q. Some of it. But I am just trying to follow out your own statements. You started in by saying you job some material.

A. That is right.

Q. Now, what percentage of your total business during the period in question was that that you job, as you call it?

A. I think I would figure that to be about 75, 80 per cent.

Q. So there is only about then 20 to 25 per cent at the [fol. 199] most——

A. That is right.

Q. —that you processed up at your place, is that right?

A. That is right.

Q. Now, what did this processing consist of?

A. Well, sewed these different braids together and made trimmings out of them, connect them, joined them with other braids and so on. I have sewing machines for that purpose. Then I make also passamenterie where I have hands that makes ornaments and tassels and things of that kind.

Q. This material that you process which at the most you say is 25 per cent of your business—did you ship any of it out of the State of New York during the period in question?

A. Yes.

Q. Would your estimate of about 25 per cent apply to that processed material?

A. It would.

Q. In other words, would it be correct to say that during the period in question that it is your best recollection that you shipped outside the State of New York about 25 per cent, a maximum of 20 or 25 per cent of your business?

A. That is right.

Mr. Falk: That is all.

Redirect examination.

By Mr. Entes:

Q. Mr. Riback, in reference to the merchandise that you said you jobbed, do you sell it exactly the way you receive

it in these job lots, or do you do anything to it before you [fol. 200] sell it.

A. Well, I put it up in different forms because some have to be measured off and some want more, and I have to spool it more, and so on, and sometimes I take it just as it is and send it out.

Q. On this job lot that you say is 75 per cent of your business, you do do work on it, is that so?

A. Some work. I have got to pack it; I have got to ship it.

Q. Do you have to cut it up?

A. Sometimes I have to cut it up.

Q. Do you have to go and cut it up in different shapes, sizes?

A. Lengths.

Q. Do you measure these things?

A. Some of them are measured, yes.

Q. And you pack them up and sell them, is that right?

A. That is right.

Q. Do you take these job lots out of the original containers in which you receive them?

A. What do you mean by job lots?

Q. Excuse me. You take these cuts out of the original containers in which you purchase them?

A. Yes.

Q. And when you do something to them, cut them up or measure them, then do you put them in your own containers?

A. Yes, certainly.

Q. You pack them up in your own original containers?

A. Yes.

[fol. 201] Q. Then all your merchandise that is sold, no matter where it is sold is sold in your own original containers?

A. Oh, yes.

Q. Do you sell any of your merchandise at all in the original containers in which you purchase them?

A. Well, that is seldom. I may get a box of stuff in with no marking on it.

Q. Do you sell more than one per cent of your business in original containers; that is, the containers that you buy it in?

A. I do not think it is more than two or three per cent of it. Once in a while a box is clean and there is nothing

on it, and this stuff can go right out to the customer that I don't have to do nothing with it, and I send it out in the box. What difference does it make whether I take my box or his box?

Q. You say that is no more than two per cent of your business?

A. It is very seldom that it happens.

Q. So you can testify that about 95 per cent of the merchandise you received is taken out of original containers?

A. Oh, yes.

Q. You do some work on them, some you process——

The Court: You are repeating yourself now, despite the advice of your colleague.

Mr. Entes: That is all.

The Court: You are excused sir. You may step down.

(Witness excused.)

[fol. 202] Frieda Cohen, called as a witness on behalf of plaintiff, being first duly sworn, testified as follows:

Mr. Entes: For the Court's information, Miss Frieda Cohen is testifying on behalf of Benjamin Weinstein. It is the south unit on the 8th floor. I think if is the third page, your Honor.

The Court: Page 3.

Mr. Entes: Yes; the first name on the list.

The Court: Benjamine Weinstein?

Mr. Entes: Yes; the south unit on the 8th floor, and the period is the full period in question, 2/1/38 to the present time.

Direct examination.

By Mr. Entes:

Q. Miss Cohen, are you employed by Benjamin Weinstein?

A. Yes.

Q. Were you employed from the period October 24, 1938, to February 5, 1942? That is about four years.

A. No.

Q. When were you first employed?

A. July, 1941.

Q. July, 1941?

A. To the present.

Q. What is your position with Mr. Weinstein?

A. I am a forelady.

Q. And were you a forelady at the time of employment?

A. Yes.

Q. Did you have access to his accounts, previous accounts, [fol. 203] at that time?

A. Yes.

Q. And have you access to his accounts at the present time?

A. Yes, I do.

Q. And you are personally familiar with these previous accounts and the present accounts?

A. Yes, I am.

Q. What business is Mr. Weinstein in?

A. Mr. Weinstein is a contractor.

Q. A dress contractor?

A. A dress contractor.

Q. From your experience, whom did Mr. Weinstein contract for?

A. For M. Gollomp & Sons, 501 Seventh Avenue.

Q. And did he contract exclusively for Gollomp?

A. Yes.

Q. And does he still contract for Mr. Gollomp?

A. Yes, he does.

Mr. Entes: That is all.

The Court: Cross examine.

Mr. Falk: No questions.

The Court: You are excused.

(Witness excused.)

Mr. Falk: May I ask that the last witness remain here until we see whether we are going to put on some testimony about Gollomp? It may be necessary to call her for cross-examination.

Mr. Entes: Your Honor, Gollomp won't appear until tomorrow. If they wish to cross-examine, they may cross-[fol. 204] examine now or they may subpoena her. We are not putting Gollomp on today. We will bring them on tomorrow.

Mr. Falk: Will you just ask the witness to be available, then, in case we want her back?

The Court: No. If you want to cross-examine her you have got to do her right now. All she has testified about is

that her employer works for Gollomp. Now, what more can you get out of her?

Mr. Falk: All right. I do not want to ask her any questions now.

Mr. Entes: If your Honor, please, this witness is an employee and does not speak very good English.

The Court: Do you want an interpreter?

Mr. Entes: No. He does not need an interpreter. All he will testify is what the young lady testified previously.

The Court: Can't you save him the trouble by having the manufacturer or jobber testify to it?

Mr. Entes: If your Honor thinks the Court will save time, if counsel for the defense will stipulate for each and every dress contractor that they are engaged as just contractors and then permit us to bring the manufacturers down, we may eliminate some of those dress contractors.

The Court: All I suggested was that undoubtedly Mr. Gollomp could have testified that he employes Benjamin [fol. 205] Weinstein was his contractor.

Mr. Entes: Yes; but, your Honor, we would have to have in the record the testimony that this contractor worked exclusively for Gollomp. Gollomp have other contractors. Gollomp may not be in a position to know whether or not he works for any other manufacturer.

The Court: Very good.

Gennaro Salemi, called as a witness on behalf of plaintiff, being first duly sworn, testified as follows:

Direct examination.

By Mr. Entes:

Q. What floor is Miss Sullivan on?

A. 21st floor.

The Court: What is the name of the tenant?

Mr. Entes: Agnes Sullivan. It is on the next to the last page, your Honor, in the middle of the sheet.

The Court: I have it.

Q. Mr. Salemi, were you employed by Miss Agnes Sullivan?

A. Yes.

Q. How many years?

A. In this building.
Q. How many years?
A. 15 years.
Q. 15 years?
A. Yes; I worked for Miss Sullivan.
Q. And Miss Sullivan is on the 20th floor, which you know as the 21st floor?
A. 21st floor.
Q. And she has been there since 1935?
A. Yes.
Q. Is she a dress contractor?
A. Dress contractor, Yes.
[fol. 206] Q. Who is her jobber?
A. Spectator Sports, 530 Seventh Avenue.
Q. Is that the only contractor she works for?
A. I don't know.
Q. Does she contract for Spectator Sports, is that so?
A. Yes.

Mr. Entes: That is all.
The Court: Any questions?
Mr. Falk: No questions.
The Court: You are excused.
Mr. Entes: One other question.

Q. Do you know any other manufacturer she worked for?
A. I don't know.
Q. That is the only one you know?
A. That is all.

(Witness excused.)

Max S. Yuni, called as a witness on behalf of plaintiff, being first duly sworn, testified as follows:

The Court: Is he on the 4th floor?
Mr. Entes: Yes.
The Witness: Yes.
The Court: All right.

Direct examination.

By Mr. Entes:

Q. Mr. Yuni, you occupy the 4th floor south at 571 Eighth [fol. 207] Avenue, Borough of Manhattan, City of New York?

A. Yes, sir.

Q. And you are still there?

A. Yes, sir.

Q. When did you first move in, February 1st or——

A. December—my lease is from February—I moved in a month before—I moved in sometime the latter part of of December.

Q. December of 1940?

A. Yes.

Q. Your lease reads here from February 1, 1941?

A. That is right.

Q. You went in a few months before your lease?

A. That is right.

Q. And you are still there?

A. Still there.

Q. And you are a dress contractor?

A. Yes.

Q. Whom do you contract for?

A. C. H. D. Robbins & Company.

Q. Where are they located, sir?

A. 525 Seventh Avenue.

Q. Did you contract for anybody else during the period, mind you, of December, 1940, to February 5, 1942?

A. Just one particular lot, that is about all. I work exclusively for Robbins. Just one lot for someone else I did.

Q. When you made your dresses did you ship them to C. H. D. Robbins?

A. Yes, sir.

Q. Did you frequently place—what is this, a manufac-[fol. 208] turer or a jobber?

A. He is a jobber.

Q. Did you go to your jobber's place frequently?

A. Almost every day.

Q. Almost every day?

A. Yes.

Q. And was that during the period, for that one-year period or 13 months' period, December 1940, to February 5, 1942,—could you testify that you went nearly every day to see Robbins?

A. I would not say every day.

Q. I mean almost every day.

A. Not every day. About 50 per cent of the week I spent there time each day.

Q. And did you see your dresses at this place?

A. Certainly.

Q. And did you have occasion to see these dresses wrapped and packed in packages?

A. That is right.

Q. And did you see where these dresses were being shipped to?

A. Oh, I would not know that, no.

Q. You don't know of your own knowledge?

A. I would not know. I would not know where they shipped them to.

Q. Do you mean you would not know whether they were shipped to states outside the State of New York, any addresses outside the State of New York?

Mr. Falk: The witness has stated he does not know where they are shipped.

The Court: He does not know. I will take his word for it that he does not know where they were shipped.

[fol. 209] Mr. Entes: Your Honor, he may be confused as to the names of the parties. He may know the addresses.

The Court: Do you know the addresses?

The Witness: No.

Q. Cities?

A. Cities? I know they ship them all over the country.

Q. Did you see the different cities?

A. I did not look.

The Court: You did not see them?

The Witness: No.

The Court: Strike out the answer about what he knows, because he was only told that.

Q. Did you ever see any of the original orders for these dresses?

A. That is not displayed so openly.

Q. You only got the jobber's orders?

A. I only got the jobber's orders. In fact, they cut them up, too, and we get them cut and we just manufacture them and send them to the City address, and that is all I know of, and we get paid.

Q. Do you buy any of the dress materials or do you get them?

A. I don't buy materials. I buy trimmings for the dresses, like thread, seam binding, hooks and eyes, that is all.

Mr. Entes: That is all.
Mr. Falk: No question.

(Witness excused.)

[fol. 210] SIDNEY VANGILDEREN, caleld as a witness on behalf of plaintiff, being first duly sworn, testified as follows:

Mr. Entes: For the Court's information, to facilitate this, this is testimony with reference to Isidore Chessin, a dress contractor, who testified yesterday that Darney Frocks, Inc. was one of two jobbers that he did the work for during the period being sued for.

The Court: What is the name of your concern?

The Witness: Darney Frocks.

The Court: I recall it. Go right ahead.

Direct examination.

By Mr. Entes:

Q. Mr. Van Gilderen, are you employed by the Darney Frocks, Inc., at 525 Seventh Avenue?

A. I am.

Q. What is your position there?

A. Sales representative.

Q. How long have you been employed?

A. About nine years.

Q. And are you familiar with the business of the Darney Frocks, Inc.?

A. Very.

Q. And are you familiar with the contractors who work for Darney Frocks, Inc.?

A. I am.

Q. Do you know a contractor known as Isidore Chessin?

A. Yes.

Q. Located at 571 Eighth Avenue?

A. Yes, I did.

Q. Did he contract for your dresses for the period from 1938 to 1942?

A. Yes, sir.

[fol. 211] Q. Do you know where these dresses were sold?

A. Yes, I do.

Q. Can you please tell the Court as best you can remember where these dresses were sold and shipped to?

Mr. Falk: I object to the question unless there is a clear basis laid for the witness's identification of the garments.

The Court: The objection is well taken. You must qualify the witness's observational capacity.

Q. Did you know the dresses that Isidore Chessin made for Darney Frocks?

A. Yes, I did.

Q. How did you recognize such dresses?

A. Well, they have styles that we assigned to various contractors to be made; and in the course of our work in the place we generally would help assign part of the materials that go to these contractors, and we would recognize them when they came back.

Q. Then Isidore Chessin had specific styles and dresses to make for you?

A. That is right.

Q. And those dresses were distinguishable from other dresses made by other contractors since they were different styles, is that right?

A. Yes.

Q. And you were familiar with those styles?

A. Yes, I was.

Q. Do you know where the dresses of Isidore Chessin [fol. 212] were sold and shipped to during that period of 1938-1942?

A. Yes, I do.

Q. Will you please tell the Court to your best recollection where they were shipped.

A. I would say close to 95 per cent of our merchandise is shipped outside the State of New York.

Q. Would you say that 95 per cent of these particular dresses of Isidore Chessin were shipped outside the State of New York?

A. Yes, I would.

Q. And you are very definite about that?

A. Very definite.

Mr. Entes: That is all.

Cross-examination.

By Mr. Falk:

Q. Mr. Van Gilderen, if someone in your line of business asked you a similar question about where the Chessin garments had been sent during that period, would your answer

be 95 per cent was shipped outside the State of New York?

A. Yes, it would.

Q. You mean you talk and distinguish between goods that are sold in the State of New York and goods sold outside?

A. For the simple reason that we do very little, if any business in the State of New York.

Q. But from a business point of view, is there any significance whether the goods are sold in the State of New York or outside?

A. Yes; because we have a line that is not adapted to [fol. 213] conform to this locality.

Q. To the City?

A. To the City or the State.

Q. Is there a different kind of line, for example, for Columbus, Ohio, and Rochester, New York?

A. Yes, there is.

Q. You mean there is a fashion that prevails in the State of New York that does not in the other 47 States?

A. Yes, definitely.

Q. So Buffalo is distinguished from Pittsburgh and Erie, Pennsylvania and Syracuse——

A. No. We make a line that is particularly adapted, and a great majority of our business goes to the South. We don't make—we job cotton dresses. It is a summer item mostly.

Q. To you make merchandise for southern trade?

A. More or less the bulk of our business is.

Q. So if you were talking to somebody in the business world you might put it that way, might you not; and say, "We sell most of our merchandise to the South"?

A. No. If I was asked offhand I would say very little of our business is shipped locally.

Q. I ask you why in answer to the question that was put to you by plaintiff's counsel you drew the distinction between goods shipped to the State of New York and outside the State of New York. Was it because you knew that was the question that is before this Court?

[fol. 214] A. I have absolutely no interest in this case whatsoever, nor has Darney Frocks.

Q. I didn't ask you that, sir.

A. You are inferring that.

Q. I asked you whether you knew what the question was that is in issue here.

A. Yes. He asked me whether I knew where it was shipped.

Q. And you knew the question of whether it was shipped in the State of New York or out of the State of New York was the issue?

A. Yes.

Q. You know that is the point of issue?

A. I know, and I am not interested.

Q. I didn't ask you that.

A. I only met this gentleman about two minutes yesterday, and I didn't know what the case was all about.

Q. You know that that question is in issue, don't you?

A. No, I don't.

Q. So if you were asked in any other place where most of your merchandise had gone, you would answer it that way; you would draw the distinction between the State of New York and out of the State of New York?

A. I would, for very definite reasons.

Q. Will you give us the reasons?

A. Yes. We have no representation in this part of the country.

Q. Why would you distinguish New York from New [fol. 215] Jersey, then?

A. Because we have representation there, but we have none here.

Q. Have you representation in Connecticut?

A. Yes.

Q. In every state except New York?

A. No, we don't have anybody in Maine, Vermont, New Hampshire, or New York State.

Q. Then why didn't you mention those other states along with New York? Why didn't you say 95 per cent goes to states other than New York, Maine, New Hampshire, Vermont——

A. Well, I live in New York. That is closest to me.

By the Court:

Q. You have been in court this morning for about an hour or so?

A. No. I got here about 11:30.

Q. You heard the previous witness?

A. Yes.

Q. You got the idea of what we were trying to find out?

A. No, I didn't.

By Mr. Falk:

Q. With whom had you talked about your testimony, Mr. Witness?

A. Nobody.

The Court: Mr. Falk, I think you have exhausted him on that.

Mr. Falk: I think so, too. I think I made the point I wanted to make.

Q. Mr. Witness, how many contractors did you have dur-
[fol. 216] ing the period in question?

A. During that period? I guess about five or six about.

Q. And what percentage of the merchandise that you had made for you by contractors was made by Chessin during that period?

A. Well, according to union regulations each contractor has to be given an equal proportion of the number of garments we give out. Now, I could not say definitely. I would not want to put myself on record as saying that; I don't know; but according to the regulations we have from the unions, you have got to keep each one pretty well supplied as far as his capacity is concerned. I do not know what that percentage would be.

Q. You don't know?

A. No.

Q. Do you know what the period in question was? We keep referring to the period in question in those words. Do you know what it was?

A. Well, from 1940 to 1942.

Q. What time in 1942?

A. February, I believe.

Q. Now, do you know approximately what percentage of the goods that you had made for you by contractors was made by Chessin during that period?

A. I don't know.

Q. Did you consult any records before you came here to testify?

A. No.

Q. You say you are the sales manager?

A. Yes.

Q. Are you an officer of the corporation?

A. No.

Q. Is it a corporation?

A. It is.

[fol. 217] Q. Are there gentlemen up there who are officers of the corporation?

A. There are.

Q. Who are active in the business?

A. There are.

Q. How many of them?

A. Well, there are two of them.

Q. What are their names?

A. One is Abraham Goldstein and the other is Morris Bergen.

Q. Are you a stockholder of the corporation?

A. No.

Q. What end of the business do those gentlemen attend to?

A. One takes care of the contractors and the other takes care of the buying of piecegoods and helping design a line of course, we have a designer, and he cooperates with her.

Q. You have charge of the sales end?

A. Yes.

Q. Do you go out of the City?

A. Yes.

Q. And take trips?

A. Yes.

Q. And your business is to get the orders?

A. That is right.

Q. And the business of these other gentlemen is to see that they are filled, is that right?

A. Yes.

Q. Have you got a shipping department?

A. Yes.

Q. You have a shipping clerk?

A. Yes.

Q. Is that set apart on the premises?

A. Yes.

Q. When you are in the place of business when you are in the City do you spend much time in the shipping room?

A. Most of it. It is a very vital issue to me.

[fol. 218] Q. How much of the year do you spend in the City?

A. About, I guess, two-thirds of it.

Q. Did you during the period in question?

A. Yes.

Q. And you say when you are in the City you spend most of your time in the shipping room?

A. When there is work to be done. I don't spent it there as a rule, but when there is work to be done in the shipping room, when there is actual labor to be performed or work to be done, yes.

Q. What do you mean by labor to be performed?

A. Well, we ship out at certain periods during the week, and when those goods come in we pick it out for the various orders and then after we get them lined up with the various cards attached, indicating where they are to go to, one man sits at a billing machine and I call off the style numbers and addresses, and quantities, and he bills them; and then they are put in the shipping room where the actual packing takes place.

Q. What hours of the day do you do that?

A. Various hours. There are times we do it at night and sometimes in the afternoon and sometimes in the morning. There is no set period.

Q. Don't your buyers come to the City?

A. Yes.

Q. And don't you have to see them?

A. Yes, I do.

Q. Don't you have to have people out in the evenings?

A. Yes, occasionally.

[fol. 219] Q. Don't you have to show them merchandise in the City when they are here?

A. In the City, in the place of business, yes. We never take it out.

Q. Do you take them in the shipping room?

A. At times, yes.

Q. What do you take them in there for?

A. Well, sometimes they want merchandise shipped immediately, and if we have any stock on hand I ship it to them.

Q. You testified that during this period you shipped no goods to any point within the State of New York?

A. I would not say that. I did not testify no goods. We ship some goods.

Q. Within the State of New York?

A. Yes.

Q. Some to New York City?

A. Some, yes.

Q. You have some customers here in the retail trade?

A. A few, yes.

Q. And some in Albany?

A. Yes; we have one there.

Q. And some in other cities up-state?

A. We have got a few customers through the State.

Q. And when the goods come over from Chessin, in what form do they arrive? Are they in packages or on hangers?

A. They are on hangers in the truck.

Q. What do you do then?

A. They are taken out of the truck, put on a rack, and we check them off and we bill, and they are given to a young lady who is an examiner, and who examines them to see [fol. 220] that they are in good condition, and then after that they are put in stock or in the room and then assorted amongst the other styles that we have.

Q. They are not put right in the shipping room, are they, when they arrive?

A. Well, the way our business is run, and the entire ready-to-wear business is rather unique with the exception of the showroom and the office and the designing room, practically the whole place is a shipping room, because it is done there all over the loft.

Q. When the buyers look at the merchandise that is shipped from Chessin, for example, they don't look at it in the shipping room, do they?

A. Originally?

Q. No, I mean when the buyers are in New York.

A. No, we have a showroom.

Q. Isn't that where the merchandise is placed, or, at least, some part of it?

A. What do you mean, "placed"?

Q. When you receive it from Chessin, don't you hang it up in the showroom?

A. No; that is just to show merchandise. We have space outside.

Q. Do you have a stockroom?

A. Yes, you could call it that, but our stockroom is, incidentally, part of our shipping room, also.

Q. Do you do anything to these garments when they come from Chessin—did you during that period—affix any but- [fol. 221] tons or trimmings?

A. Oh, there may be a rare instance where a button is missing or something; but as a rule, no.

Q. How about labels?

A. No, we don't use labels.

Q. How about size tickets?

A. That is put on by the contractor.

Q. Did you go back in your records in any way to ascertain whether in the period in question the goods that you sold and shipped to the City and other points in New York State were or were not goods you received from Chessin?

A. That question is not clear.

Q. Well, do you know what the sum of the goods that you received from Chessin were delivered by you to customers in New York City and other points in the State?

A. It is possible; I won't say no; it is possible that there have.

Q. And it is possible that the bulk of the Chessin goods happened to be sold in the City and State, is it?

A. No, it is not quite possible, because we have to take a lot of averages and percentages. We do so little business in New York City or New York State that the bulk could not be shipped.

Q. Mr. Witness, you may think you have to take a lot of averages for certain purposes, but we are here to ascertain specific facts for a specific period of time. And I ask you now, discarding your law of averages, which may [fol. 222] serve a useful purpose for a business estimate or computation, whether you can testify before this Court that it is not possible that the bulk of the Chessin goods that reached you during the period in question were delivered to your customers in New York City and New York State?

A. Well, I put that in the realm of possibility. Anything. I would say anything is possible.

Mr. Falk: That is all.

Redirect examination.

By Mr. Entes:

Q. Mr. Witness, you saw the styles of dresses that Isidore Chessin made when they came into your place during that period?

A. Yes.

Q. Are you familiar with that?

A. I was.

Q. And you recognized them as his?

A. Yes.

Q. And did you sell many of those yourself?

A. Naturally.

Q. And where did you sell those dresses?

A. Well, my territory starts in Pittsburgh, and I go as far as—as far west as Nebraska, as far north as Duluth, Minnesota, and as far south as Louisville, Kentucky.

Q. And you know for a fact you sold Isidore Chessin's dresses in those places?

A. Yes.

Q. And did you sell Isidore Chessin's dresses continually in those places, the different styles he made?

A. Certainly.

[fol. 223] Q. And when you sold those dresses to those different accounts, you knew they were Chessin's dresses?

A. I know more or less the various contractors who make the various styles.

Q. You mean by the style of the particular dress, isn't that so?

A. Yes.

Mr. Entes: That is all.

Recross-examination.

By Mr. Falk:

Q. Was the same style ever made by more than one contractor?

A. Yes.

Q. Isn't it a fact that if you found that one number was a success you might put several contractors working on it? Yes or no, please?

A. Yes.

Q. And is it a fact that if you went out and took a model and showed it somewhere that may have been made by Chessin, and got an order for it, it may have been filled eventually by goods that were made by one of your other contractors?

A. I do not know of those instances.

Q. Isn't it possible?

A. Possible.

Mr. Falk: That is all.

The Court: You may step down.

(Witness excused.)

[fol. 224] HAROLD GLUCK, called as a witness on behalf of plaintiff, being first duly sworn, testified as follows:

Direct examination.

By Mr. Entes:

Mr. Entes: For the Court's information, this witness is testifying on behalf of University Frocks, 1400 Broadway.

The Court: A manufacturer?

Mr. Entes: A jobber or manufacturer.

The Witness: Jobber.

Mr. Entes: And the testimony is in reference to the testimony of Ansonia Frocks, if your Honor recalls.

The Court: What is the tenant's name?

Mr. Entes: The tenant's name is Ansonia Frocks, page 3, second name.

The Court: All right.

Q. Mr. Gluck, are you employed by the University Frocks at 1400 Broadway?

A. I am.

Q. And how long have you been employed there?

A. Ten years.

Q. And in what capacity are you employed?

A. Sales manager.

Q. And have you been such sales manager for the past ten years?

A. No.

Q. How long?

A. The last five.

Q. The last five years?

A. Yes.

[fol. 225] Q. And are you familiar with the nature and the character of your employer's business?

A. I am.

Q. And have you access to the accounts and merchandise of your employer?

A. I do.

Q. Do you know the Ansonia Frocks, Inc.?

A. I do.

Q. And were they a contractor for your employer from the period of February 1, 1941, to February 5, 1942?

A. Yes.

Q. And are they still a contractor for you?
A. Yes.
Q. And do they contract exclusively for you, do you know?
A. Yes.
Q. And what do they contract? Dresses?
A. Dresses.
Q. Did you have any other contractors during that period?
A. Yes.
Q. How many?
A. Oh, I should judge about eight.
Q. Were you able to recognize the particular dresses of the Ansonia Frocks?
A. Yes.
Q. How did you so recognize them?
A. By style numbers.
Q. Did Ansonia Frocks make a particular style other than the other contractors?
A. Repeat that, please.
Q. Was the particular style number by the Ansonia Frocks different than the particular style number of another contractor?
A. Yes; the numbers are different.
Q. They are distinguishable, is that so?
A. By style and also numbers.
Q. Are you familiar with the delivery and sale of the [fol. 226] Ansonia Frocks by your employer?
A. Individually?
Q. All the dresses that Ansonia Frocks sent to your employer.
A. I don't understand your question.

By the Court:

Q. What happened to the dresses you got from Ansonia Frocks?
A. Sold them.
Q. Where do you sell them?
A. All over the country.

By Mr. Entes:

Q. The different states in the Union?
A. That is right.

Q. Was that for the entire period of February 1, 1941, to February 5, 1942?

A. That is right.

Q. You are sure of that, are you?

A. Yes, sir.

Q. The percentage of these dresses—what percentage of these dresses would you say that you know of your own knowledge was shipped outside the State of New York?

A. I have got the record, if you want the figures.

Q. Have you got the figures?

A. Yes.

Q. Where were these figures taken from?

A. From the books.

Q. Book records?

A. Yes.

Q. Ledger books?

A. Yes.

Q. Would you refresh your memory from these figures and tell the Court the information you have there.

A. Well, in 1938 we did $1,210,617, and out of that in [fol. 227] New York State alone there was $438,080.

Q. In New York State?

A. Yes.

Q. That is a little less than 50 per cent, is that so?

A. It is about 40.

Q. And where was the rest of the merchandise sent?

Mr. Falk: What year was that?

The Witness: 1938.

Q. Have you any figures for 1941?

A. Yes.

Q. Let us hear those figures.

A. For the whole country we did $1,516,868, and in New York State $377,000.

Q. And those figures, that is about 20 per cent to New York State, is that so?

A. Yes.

Q. Now confining yourself to Ansonia Frocks were they sold outside the State of New York, too?

A. Yes.

Q. Could you testify to the Court that the gross bulk of that was sold outside——

A. That I can't remember, because when we get a style in from Ansonia, we may get styles in from other contrac-

tors, we don't ship a customer just one style. We ship a group of styles so that it is a decent sized shipment. So in one instance it may be the entire bulk and in the other instance——

Q. I don't mean that. What is the eventual disposition of all the dresses that Ansonia makes for you?

A. All over the country.

Q. Sold all over the country?

A. That is right.

[fol. 228] Q. And they were sold continuously during that period?

A. Yes.

Q. I mean, you had regular accounts?

A. Yes.

Q. You still have regular accounts?

A. Yes.

Q. Ansonia is still a contractor for you?

A. Yes.

Mr. Entes: That is all.

Cross-examination

By Mr. Falk:

Q. Mr. Gluck, what is that paper you used to refresh your recollection?

A. I got it out of the ledger and got the figures—or the bookkeeper did, I should say, when I asked her for them.

Q. When was that done?

A. This morning.

Q. Was that after you were asked to come down here and testify?

A. Yes.

Q. Who spoke to you?

A. Mr. Entes.

Q. Did Mr. Entes tell you what the purpose of your testimony was?

A. No, sir. He just wanted us to testify for the Ansonia Frocks or in conjunction, whatever it was; I don't recollect the exact words.

Q. Did he say anything to you about a distinction between goods sold inside the State of New York and outside the State of New York?

A. No.

Q. How did you happen to ask the bookkeeper to prepare figures that showed that distinction?

A. Because it shows that on the ledger, because there [fol. 229] are certain taxes in New York State that do not apply outside of New York State and the other parts of the country.

Q. But you knew you were to be asked about that, didn't you?

A. I don't recall.

Q. What else have you got on this piece of paper?

A. That is all.

Q. So you came down here with a piece of paper which has on it merely figures showing what was sold in the State of New York and outside the State of New York?

A. That is right. New York State also includes New York City, of course.

Q. Are you talking about the New York City sales tax?

A. No. There is a New York State tax, too. There is a tax in New York City——

Q. No. What State tax are you referring to?

A. I would not know that; the bookkeeper would know that. But there are separate columns on the regular sheets——

Q. Now, during the period from February 1, 1941, to February 5, 1942, how much merchandise did you have made by Ansonia Frocks?

A. That figure I haven't got; I wouldn't know.

Q. Have you got a figure showing that your total sales were during that period?

A. Yes. For the period 1941, 1942?

Q. From February 1, 1941.

[fol. 230] A. We will say for the whole year, because it is only a month's difference.

Q. Let us say for the whole year. You mean the year 1941?

A. Yes, $1,561,000.

Q. One million and a half approximately?

A. Yes.

Q. Now, how much of that represents garments that were made for you by Ansonia, if you know?

A. Well, the only thing I could say with equal distribution——

Q. Don't say anything unless you know. Do you know?

A. It has to be according to how many machines they have——

Mr. Entes: If your Honor please——

The Court: Let him answer.

A. (Continued:) I mean, I am not a production man. I am only a salesman. If I can give you an idea, if that is what you want——

Q. I just want you to answer the question.

The Court: He does not want an idea; he wants you to tell him whether you know or not.

The Witness: I do not know exactly.

Q. In 1941 do you know how much of your million and a half approximate sales were inside the State of New York—not just New York City, but State of New York? Do you know?

A. Yes, I have got it here.

Q. What is that figure?

A. $378,000.

Q. Do you know whether that figure was more or less than the goods you got from Ansonia?

A. For that year?

[fol. 231] Q. Yes.

A. I would not know those figures.

Q. Did Ansonia make more or less than $378,000 in 1941, if you know?

A. I don't know.

Q. You don't know?

A. No.

Q. So as far as you know it is possible that Ansonia may have made for you less than $378,000 in that year, is that right?

A. Maybe more.

Q. And maybe less?

A. I do not know. I do not know the figures. I could not answer that question.

Q. So that as far as you know it is possible that all those goods that were shipped into the State of New York were goods from Ansonia, isn't that right?

A. I still don't know.

Mr. Falk: That is all.

Redirect examination.

By Mr. Entes:

Q. Mr. Gluck, isn't it a fact that I served a subpoena yesterday on your employer?

A. Yes, and he called me in.

Q. And that in his presence I told the employer that we were interested in having him submit figures on the interstate business and the intrastate business?

A. That is what you spoke to him.

Q. In your presence?

A. I was called in afterwards. I was outside the room at the time.

Q. And wasn't it at his instructions that you got these figures?

A. That is right.

[fol. 232] Q. And you were familiar with the styles and dresses of Ansonia Frocks?

A. Yes.

Q. And do you know for a fact that you sold these dresses outside the State of New York?

A. That is right.

Q. And do you know for a fact they were shipped.

Mr. Falk: I object to this question on the ground that the witness has testified clearly that he does not know. He said he does not know.

A. Can I say something? You asked me a question whether Ansonia Frocks were sold in New York State. They certainly were, but they were not all sold in New York State. Your question was were they sold in New York State.

The Court: Wnat is the last question?

Mr. Entes: Do you know where the dresses of Ansonia Frocks were sold? I am trying to rehabilitate the witness. The witness testified they were sold all over the United States. The cross-examiner has tried to shake the testimony——

The Court: In one or two questions you ought to be able to do it.

Mr. Entes: Yes.

By Mr. Entes:

Q. You know that these dresses were sold outside the State of New York, is that so?

A. Yes.

Q. And you knew that these dresses were made by An-
[fol. 233] sonia Frocks?

A. Yes.

Q. And you knew they were shipped outside the State of New York?

A. Yes.

Q. And you knew they were continuously shipped—by "continuously" I mean during that entire year—outside the State of New York?

A. Yes.

Mr. Entes: That is all.

Recross-examination.

By Mr. Falk:

Q. You saw Mr. Entes at your place of business yesterday?

A. Yes.

Q. And it was as a result of his visit that you got these figures from your books?

A. Yes, sir.

Q. But you did not bring down figures to show what part of that $378,000 were Ansonia goods, is that right?

A. There isn't any way of telling what part of that, because we have several contractors, and to know how many one contractor shipped to one particular part or any part of the country, we can't tell, because in the final analysis there is a lot of other styles that other jobbers, or, I should say, other contractors, make.

Q. Don't some of the contractors make the same styles, more than one contractor?

A. No.

Q. They never do?

A. No.

Q. And each one has a style number?

A. And that is their style.

[fol. 234] Q. Then why can't you ascertain where those style numbers were shipped?

A. They were shipped all over the country.

Q. I didn't ask you that. You testified a minute ago that there was no way of br-aking down the figures to show which contractors' goods were shipped to what places: Was that your testimony?

A. That is right.

Q. No way that you could ascertain that?

A. I guess there is if we went through all our sales for the entire year and picked a particular style.

Q. But you did not do that?

A. That would take at least a month to do if you wanted to do it.

Q. I am not criticizing you for not doing it. I am just asking you, you did not do it?

A. No, we did not do it. We took gross figures.

Q. So in saying that some of these goods were shipped outside the State of New York, some of these Ansonia goods, you are just relying on your general impression, aren't you?

A. To run a business of our kind——

Q. Please answer that yes or no.

A. Your questions I can't seem to answer with yes or no; it has got to be explained, because in a business like ours we ship all over the country; there is not a part of the country we don't ship to or a city we don't ship to, and we don't know which particular style unless we know what [fol. 235] particular customer bought it.

Mr. Falk: That is all.

(Witness excused.)

Mr. Entes: If your Honor, please I would ask the Court to recess. I have subpoenaed four other witnesses for 11:30. I spoke to them yesterday and they said they would be here. When I called them, they are either sick, or their wives are sick, or some story such as that.

The Court: When do you expect to be able to go on?

Mr. Entes: I expect to go on at 2 o'clock.

The Court: We will take a recess until 2:15.

(Recess to 2:15 p. m.)

Afternoon Session

Mr. Falk: If your Honor please, the defendant finds it necessary to ask leave of the Court to withdraw the concession that was made with respect to the second and third

names on the first page of Defendant's Exhibit A; that is, Paul Schiff and Bernard Shapiro, Inc., and doing business together; and the reason for the withdrawal is that the client confused the distinction, which I think is pardonable—

The Court: Paull Schiff is the one you are talking about?

[fol. 236] Mr. Falk: Yes.

The Court: You want to withdraw the concession with respect to Paul Schiff?

Mr. Falk: We concede they were engaged in interstate activities, but not in the production of goods for interstate commerce.

The Court: All right. And Bernard Shapiro?

Mr. Falk: It is the same concern. Paul Schiff and Bernard Shapiro, Inc.

Mr. Entes: For the purpose of the record, your Honor, it has been conceded that H. Maimin Company, Inc. occupied the entire 21st floor for the entire period for which this action is being brought; to wit, 10-24-38 to February 5, 1942.

The Court: All right.

Mr. Entes: For the purpose of the record we are recalling the Columbia Belt man.

MARTIN GOLDEN, recalled, further testified as follows:

Direct examination.

By Mr. Entes:

Q. Mr. Golden, you testified this morning that you had account in the name of Biberman Bros. at 15 Mount Vernon Street, Philadelphia, Pennsylvania; is that so?

A. That is right, yes.

Q. And if my memory is correct you testified that you [fol. 237] made shipments to that concern, a bill of which you have dated, I think, sometime in January of 1941?

A. That is right.

Q. Now, according to these records your lease reads that Columbia Belt Company, Inc., went on the premises February 1, 1941. Is that actually so?

A. No. We moved in ahead of time.

Q. When did you move into the premises?

A. December 20, 1940.

Q. December 20, 1940?

A. Yes, sir.

Q. And is that date a date previous to the date of the bill that you refreshed your memory from?

A. Yes.

Q. Now, in view of the fact that you have refreshed your memory as to the date that you moved in on the premises, can you now testify in this Court that the merchandise shipped to Biberman in January of 1941 was shipped from your premises on 571 Eighth Avenue?

A. To Philadelphia, to Biberman Bros.

Mr. Entes: That is all.

The Court: The answer is yes.

Any cross?

Mr. Falk: Yes.

Cross-examination.

By Mr. Falk:

Q. What goods did you ship?

A. Ladies' belts.

Q. How many?

A. A couple of hundred.

[fol. 238] Q. A couple of hundred belts?

A. Yes.

Q. What were they made of?

A. The customer's material and my backing and my buckles.

Q. What do you mean by "backing"?

A. The belt was a fabric belt, and the material is cut out of the part of the dress, the same material, and I cut out the backing to stiffen it, and I also supply the buckle.

Q. You say a couple of hundred. Have you got the bill in front of you?

A. I haven't the bill, no.

Q. What are those papers?

A. I have some bills from the electric company and telephone company to determine when I was in the premises. I knew I shipped the goods from 571, but I was not sure when you asked me if I moved in February 1st—I know I shipped it after I was in the place, and I went back and looked over my records, and I did not want to create any impression that I was testifying falsely, and I discovered

I moved in December, but I did not pay rent until February 1st.

Q. So those matters concern themselves with occupancy of the premises, not with the shipping of the merchandise?

A. Yes.

Q. You went back to your place between the time you testified and the present time?

A. Yes.

Q. And you came back here?

A. Yes.

Q. And did you bring back any papers that relate to the [fol. 239] shipments of those belts to Philadelphia?

A. No.

Q. Have you looked up the date?

A. I looked up the date from the ledger originally and it showed from January 7th to the 15th, 1941, I shipped total dollars and cents $376.07, representing a few thousand or a few hundred belts.

Q. A few thousand?

A. A few thousand or a few hundred.

Q. You said before a couple of hundred belts.

A. A series of shipments.

Q. You gave us one date. What are the dates?

A. From January 7th to the 15th.

Q. What does that ledger entry say? Tell us exactly what your ledger entry says. Is there more than one entry?

A. Yes. But I just got the total amount of the amount of business I did in that period.

Q. Were they all on the same date?

A. No.

Q. What dates were given?

A. Well, I started the shipments January 7th and completed on January 15th. Two shipments were made.

Q. Two shipments?

A. That is right.

Q. When you say you started to ship, you mean you shipped some January 7th and some more on the 15th?

A. Yes.

Q. And that was all?

A. That was all.

Q. Is that a loose-leaf ledger?

A. It is a regular loose-leaf ledger.

[fol. 240] Q. And you could have taken one sheet and brought it down with you, couldn't you?

A. Yes, I could have done it.
Q. But you didn't do it?
A. No, I didn't think it was necessary.
Q. You didn't do it?
A. No.

The Court: How many dollars?
The Witness: $376.07.

Q. And what was your gross business in the year 1941?
A. Approximately $45,000.

Mr. Falk: That is all.

(Witness excused.)

MAURICE NEWMAN, called as a witness on behalf of plaintiff, being first duly sworn, testified as follows:

Direct examination.

By Mr. Entes:

Q. Mr. Newman, do you conduct a place of business at 571 Eighth Avenue, Borough of Manhattan, City of New York?
A. I do.
Q. And what floor are you on?
A. On the 16th.

Mr. Entes: The 16th floor I think is noted as the 15th, your Honor.
The Court: I understand.

Q. What part of the 15th or 16th floor do you occupy?
A. I think it is the front.
Q. Is it called the northwest unit?
[fol. 241] A. Yes, that is right.
Q. How long have you been there?
A. In that unit?
Q. Yes.
A. In that unit I think the third year. I have been on the same floor to the back in another unit another two years. I am in the building about five years.
Q. You occupied the southwest unit on the 15th floor, that is, to the back, for how long? Would you say since November 1st, 1940?

A. Since 1937, I think. Since 1937.

Q. The back unit, the southwest unit, you occupied since 1937?

A. I occupied in 1937? 1939, I think.

Q. Just for the record, we have here in the record——

A. I don't know exactly.

Q. We will straighten you out. We have it on the record that Maurice Newman occupied the northwest unit on the 15th floor from 1937 to 1940, and from 1940 he occupied the southwest unit. Just to keep the record straight.

The Court: He was in the building throughout the period?

The Witness: That is right.

Q. And you were always on that floor during that period?

A. That is right.

Q. And what was the nature of your business at that time?

A. Embroidery; embroidery and stitching.

Q. And what is the nature of your business at the present [fol. 242] time?

A. Same thing.

Q. And do you go under a trade name or——

A. Newman Embroidery.

Q. You are known as Newman Embroidery?

A. Yes.

By the Court:

Q. What do you do? Do you buy embroidery, or do you manufacture embroidery?

A. I manufacture embroidery.

Q. Do you have machines?

A. That is right.

By Mr. Entes:

Q. Whom do you manufacture for?

A. For dress manufacturers.

Q. Mr. Newman, we are only concerned with the period October 24, 1938, to February 5, 1942, roughly the years 1939, 1940 and 1941. We are not interested in any business you did before that or after that as far as the questions I am going to ask you.

The Court: 1939, 1940 and 1941.

A. I understand.

Q. Mr. Newman, can you recall whom you manufactured for in those years that I mentioned, to your best recollection?

A. Will you mention again what years?

Q. 1939, 1940, 1941.

A. Yes. Pickwick Dress——

The Court: Do you sell them or contract for them?

The Witness: Contract for them.

Q. Where are they located, do you know?

[fol. 243] A. On the corner of 38th Street and Broadway. What is the big building? 1400 Broadway.

The Court: Whom else?

The Witness: Fashion Wear Dress, 1400 Broadway; Ira Rentner and Miller on Seventh Avenue—I don't know the number. It is 530, I believe.

Q. One minute. Do these three manufacturers that you mentioned—do they get the bulk of your business?

A. I mean I get their business.

Q. I mean either way. Do you do most of the work for those three?

A. Well, a good deal. Not most of it; a good deal of it.

Q. What do you mean by a good deal?

A. Oh, a few thousand a month.

Q. I mean, how much of your business roughly?

A. You mean the amount of dresses that I work on?

By the Court:

Q. What percentage of your business do you do for these three people?

A. My business?

Q. Yes.

A. For these three people I did mostly, the bulk.

By Mr. Entes:

Q. Most of your business was confined to those three?

A. About 75 or 80 per cent.

Q. And will you explain to the Court what you mean when [fol. 244] you say you embroider dresses, the type of work you did in your place.

A. They cut up their dresses and before they stitch the dresses up they send them in to me to be embroidered,

ornamentation; and naturally, after I embroider it, we sent them back and they sew up the dresses, and that is all.

Q. When you get the dresses they are not finished yet?

A. In parts.

Q. And when you send them back they are still in parts?

A. In parts.

Q. Do you visit these manufacturers or jobbers?

A. I do.

Q. During that period I am talking about.

A. I do.

Q. How frequently do you visit those people?

A. Three or four times a week. Sometimes three or four times a day.

Q. Have you occasion to see your embroidery on the dresses in that place?

A. Yes.

Q. And do you recognize your embroidery work as different from other embroidery work that may be done on that dress?

A. I do.

Q. How do you recognize them? How do you recognize your particular work?

A. I usually get the numbers that I make the samples, and they don't give them away.

Q. You mean you get the style number of the dress?

A. Style. Not by the style number, but my workmanship. [fol. 245] It is to my best interest that the work is not supplied or given away to anybody else, because I make my own original designs.

The Court: You recognize your designs?

The Witness: I recognize my designs, my work.

Q. Have you see- these dresses, these finished dresses, with your designs on them packed in packages to be shipped from the manufacturer?

A. Packed in packages? No.

Q. Have you seen any of the original orders for the dresses for which you are to embroider?

A. Original orders? At that time, no.

Q. I mean, did you see any account numbers, the name of the account who was ordering?

A. No, I have not.

Q. Do you know what happened to those dresses with your embroidery on?

Mr. Falk: I object to the question because it has not as yet been established that when these pieces left the witness's premises and went to these three named customers of his they were made into finished dresses.

The Court: He said they were not finished dresses. We have been all through this this morning. You have got to establish his capacity to testify.

Mr. Entes: I showed that he did visit the place.

The Court: Yes, but he said he never saw the packages and never saw the orders.

[fol. 246] The Witness: I have seen packages and orders, but not my own. I can't tell that it is my dresses.

The Court: Exactly.

Q. You don't know, is that so?

A. I can't tell what they put in the packages.

Q. Can you please give me the third manufacturer?

A. Ira Rentner and Miller.

Q. What is their address?

A. It is on Seventh Avenue. I don't know the number. Seventh Avenue and 36th Street.

The Court: Any cross?

Mr. Falk: No questions.

(Witness excused.)

Richard Grey, called as a witness on behalf of plaintiff, being first duly sworn, testified as follows:

Direct examination.

By Mr. Entes:

Q. Mr. Grey, do you recall what floor you had a place of business in at 571 Eighth Avenue?

A. On the 12th floor.

Q. Mr. Grey, the records here show that you occupied the southwest unit on the 12th floor from 1936 to 1942.

A. That is right.

Q. The middle of 1942.

A. That is right.

Q. And what was your business at that time?
A. I am in the contracting business only.

The Court: Contracting for dresses?
[fol. 247] The Witness: No; coats. Rubberized coats.

Q. Mr. Grey, the questions I am going to ask you are only for the time you were in the premises 571 Eighth Avenue.
A. Yes.
Q. You are no longer there, is that so?
A. No.
Q. You are a contractor of rubberized coats?
A. Yes.
Q. And whom did you contract for?
A. For Platell Bros.
Q. Do you know their address?
A. 270 West 38th Street.
Q. Platell?
A. Yes.
Q. And did you do all your contracting for them at that time?
A. 95 per cent.
Q. 95 per cent?
A. Yes.
Q. Did you have occasion to visit Platell Bros., did you visit them during that time?
A. Once in a while. I was across the street.
Q. How often, once a day, once a week, once a month?
A. No; I have been in every day.
Q. Every day?
A. Sometimes two or three times a day.
Q. Sometimes two of three times a day?
A. Yes.
Q. And did you see your coats or your rubberized fabrics at this manufacturer when you went to visit the place?
A. Well, they got the stockroom separate; I had nothing to do with the stockroom.
[fol. 248] Q. You did not see your particular garments there, did you?
A. I used to see girls working, because they were examining them at the table; but after it went into the stockroom I don't know what happened.
Q. Have you any knowledge what happened to these dresses, where they were shipped, or anything of that sort?

A. I ain't got much knowledge.

Q. You don't know anything about it?

A. No.

Q. Now, Mr. Grey, the materials that you got to make these rubberized fabrics, did you purchase those?

A. Well, I used to get cut material. I didn't know from where they came. They used to cut and send me the cut work.

Q. Who sent you the cut work, the manufacturer?

A. The manufacturer.

Q. When you made the rubberized fabric for the manufacturer, did he send you original orders for the merchandise, where they were going to?

A. No.

Q. He sent you his own orders?

A. His own orders.

Q. Now, in these rubberized fabrics, what do you mean when you rubberize fabrics? Do you get the material for the fabrics separately and the material for the rubber separately?

A. No; it is material they put rubberizing on——

The Court: It is already rubberized when you get it?

[fol. 249] The Witness: Yes.

Q. You get already cut up rubberized material?

A. Yes.

Q. And you don't add anything of your own?

A. Just the thread.

Q. The thread and cotton?

A. Yes.

Mr. Entes: That is all.

Mr. Falk: No questions.

(Witness excused.)

Mr. Entes: Your Honor, I am recalling the witness Maurice Newman.

MAURICE NEWMAN, recalled, further testified as follows:

Direct examination.

By Mr. Entes:

Q. Mr. Newman, you testified that you did work, embroidered cut-up dresses for three manufacturers or jobbers, known as Pickwick Dress, Fashion Wear and Ira Rentner & Miller?

A. That is right.

Q. Now, of those three that you did work for, did you do more work for one than for the others, or were they equally divided?

A. No, I may have done more for one than another I worked for more than three, but I gave you three.

Q. Were those three equally divided?

A. No; mostly for the Pickwick Dress.

[fol. 250] Q. Most of that business was the Pickwick Dress?

A. Yes.

Q. Who was next in the three?

A. Ira Rentner & Miller.

Q. Was the amount of work that you did for Pickwick Dress more than the work of the Fashion Wear and Ira Rentner & Miller together?

A. Yes, that is right.

Q. So you can say that of those three the bulk of your work was given to Pickwick Dress?

A. Yes.

Q. And Pickwick Dress is a considerable part of the work that you did for all dress people during that period?

Mr. Falk: I object to the question on the ground that "a considerable part" is too vague.

The Court: Yes, it is too vague.

Q. Now, Mr. Newman, did you get any dresses returned for being improperly done, and so forth?

A. Sometimes.

Q. And when these dresses were returned were there any identification where they came from?

A. Yes, on some of them there were.

Q. Where did some of them come from?

A. Some came from out of town, some from Cleveland, from various western states. I do not recollect exactly.

Q. But you do remember that many of these dresses came from accounts of the manufacturer or jobber and were [fol. 251] outside of the State of New York?

A. They came back not from him. They came back to be repaired sometimes. If there was a rip in it they sent it back to him and he sent it back to me.

Q. But you know that those dresses were from a certain account out of town?

A. They were from out of town.

The Court: You did not know anything of the kind. You saw a label.

The Witness: I saw a label.

The Court: And you thought it was from that account?

The Witness: Yes.

The Court: For all you know, the label may have been put on at Pickwick?

The Witness: It is possible.

The Court: You don't really know.

The Witness: I don't know; that is right.

Mr. Entes: That will be all, your Honor.

Mr. Falk: No question.

(Witness excused.)

Emil Raizen, called as a witness on behalf of plaintiff, being first duly sworn, testified as follows:

Direct examination.

By Mr. Entes:

Q. Mr. Raizen, did you occupy the southerly unit on the [fol. 252] 23rd floor—I think you call it the 24th, is that so——

A. Yes.

Q. (Continuing:) Before 1938 to the present time?

A. Oh, yes. I have been about 10 years in the building.

Q. How many units are there on that floor?

A. Two.

Q. A southerly and a northerly?

A. Yes.

The Court: Is that Raizen & Trager?

The Witness: Yes.

Q. And you occupied that southerly unit?
A. I occupied the northwest corner.
Q. Whatever the unit is.
A. Northwest.
Q. And what business were you in during that time?
A. Contracting dresses.
Q. And are you still a dress contractor?
A. Yes.
Q. Now, Mr. Raizen, we are only interested in the years 1939, 1940, and 1941 generally speaking. We are interested in a few months more or less up to February, 1942, and back as far as October, 1938. Now, the questions I am going to ask you are confined to that period. Were you a dress contractor during that time?
A. Yes.
Q. Whom did you contract for?
A. A fellow by the name of Byspill, Herman Byspill. I believe it is 550 Seventh Avenue. Northwest corner of Seventh Avenue and 39th Street.
Q. Are they still in business there?
A. Yes.
Q. Mr. Raizen, did you contract exclusively for Herman [fol. 253] Byspill?
A. For the last 17 years one house.
Q. You did not work for anybody else?
A. No.
Q. Did you have occasion to visit the manufacturer's place of business?
A. Yes.
Q. How often did you frequent or visit such place? By that I mean how many times a day or how many times a week?
A. Well, almost every day you went there.
Q. And when you went to this place of business, this manufacturer, did you see your particular dresses there?
A. That we make, yes, sometimes.
Q. Were you able to recognize them, your dresses, as distinguished from other dresses that other contractors might have made for this manufacturer?
A. Yes.
Q. And how did you recognize your dresses as distinguished from the other contractors' dresses?

A. Well, we worked, four contractors, and each one makes a certain amount of styles, every season, a certain amount of styles are assigned to each contractor.

Q. You mean your contracting firm has one particular style that another contractor does not have?

A. That is right.

Q. So you are able to recognize your dresses?

A. Yes.

Q. Do you know what happens to your dresses after they go to the manufacturer? I mean do you know?

A. He ships them out.

[fol. 254] The Court: Do you know?

The Witness: Well, I don't know. I suppose——

The Court: You don't know. All right.

Q. Mr. Raizen, do you ever see or have you ever seen the original orders for your particular dresses from the manufacturer, the account orders?

A. No.

Q. When you get orders from the manufacturer, are these the manufacturer's orders?

A. Yes, his own.

Q. His own orders?

A. His own stationery.

Q. Are dresses returned to you sometimes?

A. Well, very seldom.

Q. On these few occasions when they are returned, have you any way of knowing where they come from other than your manufacturer?

A. I can't tell—they take the tickets off.

Q. Mr. Raizen, the merchandise or the dress fabrics that you get, do you purchase those? Do you purchase any of that?

A. What do you mean by "purchase"?

The Court: Do you buy them or is it supplied to you?

The Witness: Everything is supplied by the jobber, the manufacturer.

Mr. Entes: That is all, Honor.

Mr. Falk: That is all. No questions.

(Witness excused.)

[fol. 255] VINCENT GIAMBERDINI, called as a witness on behalf of the plaintiff, being duly sworn, testified as follows:

Direct examination.

By Mr. Entes:

Q. Mr. Giamberdini, what floor are you doing business on?
A. Well, at the present the 11th floor.
Q. What floor were you on before?
A. 17th.

The Court: What is the name of the firm?
Mr. Entes: Your Honor, Vincent Giamberdini would be listed on the 16th floor.

Q. Mr. Giamberdini, I have here a statement of your tenancy and it says you were on the southwest unit on the 16th floor, but you know it as the 17th floor?
A. That is right.
Q. From February 1, 1935, to December 31, 1942, is that correct?
A. Yes.

The Court: What is your line of business?
The Witness: Manufacturing dresses.

Q. Are you a dress manufacturer or dress contractor?
A. Contractor. We make the garments.
Q. Now, Mr. Giamberdini, we only want you to confine your answers for the period October 24, 1938 to February 5, 1942, roughly speaking the years of 1939, 1940 and 1941. I am not interested in what business you did before or what business you are doing now. Now, during that period you [fol. 256] were a dress contractor?
A. That is right.
Q. And whom did you contract for?
A. Mairell.
Q. And where are they located?
A. 530 Seventh Avenue.
Q. And did you contract exclusively for that party?
A. Exclusively.
Q. And did you have occasion to visit—what is he, a manufacturer?
A. They are manufacturers.
Q. Did you have occasion to visit the manufacturer?
A. Well, practically every day.

Q. When you went to the manufacturer did you see your dresses there?

A. Yes, sir.

Q. And were you able to recognize your dresses as distinguished from dresses of other contractors?

A. Yes.

Q. And how do you recognize such dresses?

A. Well, the manufacturers usually give us one style to work on and other contractors get one style to work on. We never work—that is, both contractors never work on two styles—that is, both contractors never work on one single dress.

Q. In other words, each contractor for that manufacturer has a separate style number?

A. That is right.

Q. Do you know what your manufacturer did with your dresses, where he shipped them?

A. Well——

The Court: Just a minute. Do you know?

[fol. 257] Q. Answer it just yes or no.

A. Yes.

The Court: Tell us how you know. Let us not get off the track.

Q. How do you have this knowledge?

A. Well, I have seen them shipped out in boxes.

Q. Have you seen your dresses in boxes?

A. That is right.

Q. And did you see these boxes marked?

A. They are marked.

Q. And are these markings for cities outside of the State of New York?

A. Well, some in the city, some out of town.

Q. How often do you see these dresses in boxes?

A. How often?

Q. How many times a week, how many times a day, how many times a month, on an average?

A. A few times a week.

Q. A few times a week you see your dresses put in boxes and shipped?

A. Once in a while I do.

Q. I mean how often? As best as you can recollect.

A. I can't tell.

Q. From your best recollection, when you see your dresses particularly put in boxes and shipped, do you know what portion of that, do you recall, goes outside of the State of New York, of your own recollection?

[fol. 258] A. I do not know exactly.

Q. Have you seen from time to time during the three-year period that I mentioned your dresses put in packages for cities outside of the State of New York?

A. (No answer.)

Q. By that I mean——

The Court: Let him answer. Go ahead.

A. Well, I see them packing; I have seen my dresses put in and others.

By the Court:

Q. Do you see the addresses on the packages?

A. Sometimes I do.

Q. How often have you seen the addresses?

A. Well, whenever occasion I go into the shipping room——

Q. You see your dresses?

A. Yes.

Q. And to what cities have you seen them addressed to?

A. Some to Cincinnati, Indiana, New York.

By Mr. Entes:

Q. Names of cities outside of the State of New York, is that correct?

A. Yes.

Q. Different States of the Union?

A. Yes.

Q. In other words, you saw them addressed to different cities all over the United States, is that so?

A. Yes.

Q. And you saw these dresses in 1939, 1940, 1941 and two months in 1942?

A. Yes.

[fol. 259] Mr. Entes: That will be all.

Cross-examination.

By Mr. Falk:

Q. Mr. Giamberdini, you said that you saw these dresses being shipped once in a while. I think those were your words, once in a while.

A. That is right.

Q. What do you mean by once in a while?

A. Well, I usually go into the shipping room to get some hangers, and the girls pack in the dresses, and I seen it, that is all.

Q. It is not part of your business to examine these boxes, is it?

A. No, but——

Q. Do you have any business in the shipping room except to collect your hangers and walk out with them?

A. No.

Q. You are a pretty busy man, aren't you?

A. Well, I am.

Q. Will you tell the Court about how often you are prepared to say that you saw your dresses in a box packed, closed and marked and identified the place to which it was going?

A. Well, I seen my dresses going in a box, but I did not stay there to see them marked off.

Q. They go in a box with other dresses, don't they?

A. Yes.

Q. Of other contractors?

A. Yes.

Q. And Mairell Dress Company has a big local business, has it, in New York City?

A. It has local.

[fol. 260] Q. They sell a lot of goods right here in the city, don't they?

A. Yes.

Q. And a lot of your garments go to the trade right here in New York City, don't they?

A. That is right.

Q. You don't really know, do you, where any of your particular merchandise goes in any specific case, do you?

A. Well, I see some——

Q. Well, we use the word "know" in courts of law differently than it is used among laymen——

Mr. Entes: Your Honor, I do not wish to interrupt counsel, but counsel in his cross-examination uses the word "know" asking for a conclusion——

The Court: Are you objecting to the last question?

Mr. Entes: I object to the word "know".

The Court: "Know" is a proper word. I will overrule your objection.

Mr. Falk: Will you read my question as far as I have gone?

Q. (Read) (Continuing:) —using it in the sense that we use it here, meaning of your own personal knowledge or observation, what you saw or heard——

The Court: Not what you heard.

Q. (Continuing:) —not in the sense of hearsay, but just what you observed yourself, how many of your garments [fol. 261] can you say that you know were shipped to one or another place during that period?

A. I really can't understand that question.

Q. Isn't it a fact that you, using the word "know" in the sense that I have defined it, did not know during that period which of your garments went to what places? Isn't that a fact?

A. (No answer,)

Q. You want to be frank with the Court, don't you?

A. Yes.

By the Court:

Q. Have you ever seen one of those dresses go to Cincinnati?

A. No, I never saw it.

Q. You only surmise that it went to Cincinnati?

A. Well, I take it for granted that it was shipped out of town; it is a known fact.

Q. You just assume that?

A. Yes, I assume it and I saw.

Mr. Falk: That is all.

Redirect examination.

By Mr. Entes:

Q. Mr. Giamberdini, when you saw your dress in a box, did you see the box marking subsequently or in the preparation of putting the top of the cover over the garment?

A. Well, I don't recall if I saw my dresses in a box with the covers on.

Q. Well, when you saw your dresses with other dresses [fol. 262] of contractors, did you see the ma-kings on the box at that time?

A. Yes, as soon as the box was ready they marked that up and put it on the side on the floor.

Q. Then you saw boxes with your dresses and dresses of other contractors in boxes marked up, isn't that so?

A. Yes.

Q. And these so-called marked up boxes had addresses for cities outside of the State of New York?

A. That is right.

Q. And this situation, as we just explained, did that occur many times during 1939, 1940, 1941?

A. That is right.

Q. Now, Mr. Giamberdini, do you purchase any fabrics?

A. Well, outside of trimmings, cotton, interlining——

Q. Where do you get your interlining?

A. Seam binding. We usually deal with one or two places. Hirsch.

Q. And they ship directly from their place in the City of New York to you, or do they ship them from outside?

A. We buy them and put them on the garments.

Q. They ship that to you, is that so?

A. Yes.

Mr. Entes: That will be all.

Recross-examination.

By Mr. Falk:

Q. When these dresses are packed at the manufacturers', it takes some time to put them in and check them off and wrap them up—what sort of container are they put in? [fol. 263] A. It is a corrugated box.

Q. About how many dresses are packed together?

A. Sometimes three, sometimes ten; sometimes twenty.

Q. What are they wrapped in first? Are they put in tissue paper first?

A. Tissue paper.

Q. And then what is the tissue paper put in? Is it put in a pasteboard box?

A. A piece of cardboard in between.

Q. And then after that they put it in their corrugated paper?

A. No, no corrugated paper. Corrugated box.

Q. And then the box is closed?

A. Closed.

Q. Is that a wooden box?

A. No, paper.

The Court: Corrugated box he said.

The Witness: Corrugated paper box.

Q. And that is the outside container when it is shipped, is that right?

A. Yes.

Q. Now, how long does it take to go through that whole process and mark one of those boxes?

A. It is a matter of a few seconds.

Q. Just a few seconds?

A. Yes.

Q. Did you make a practice of going there and standing there and watching the packing and seeing the names that go on the boxes?

A. Well, once a week I might have—once a week I have got to go in and get hangers.

Q. Once a week?

A. Many times, yes.

Q. You collect them once a week?

[fol. 264] A. I collect about 500 hangers a week there, and I am there for about 15 minutes counting them.

Q. Counting the hangers?

A. Yes.

Q. How long does it take you to count the hangers?

A. Well, I never actually timed myself, but I imagine about 15, 20 minutes.

Q. So you haven't much time left over to spend in the shipping room, have you?

A. No.

Q. That is about once a week?

A. That is right.

Mr. Falk: That is all.

The Court: You are excused.

Redirect examination.

By Mr. Entes:

Q. Are you friendly with the shipping clerk——

The Court: Is this re-re-redirect?
Mr. Entes: All right, your Honor. That is all.
The Court: All right, you are excused.
(Witness excused.)

FLORENCE CAHMAN, called as a witness on behalf of the plaintiff, being duly sworn, testified as follows:

Direct examination.

By Mr. Entes:

Q. What is your name?
A. Mrs. Florehce Cahman.

Mr. Entes: Your Honor, this witness is testifying for Schrader & Bazarnick. I think it is the third page from the back. It is known as the northeast and northwest [fol. 265] units on the 18th floor.
The Witness: 19th floor.
The Court: We call it the 18th.

Q. Mrs. Cahman, are you employed by Schrader?
A. Yes.
Q. And did Schrader have a place of business, the northeast unit and the northwest unit on the 18th or what you call the 19th floor?
A. That is right.
Q. From 1935 to the present time?
A. That is right.
Q. And what is the business of Mr. Schrader?
A. He is a contractor in dresses.
Q. He is a dress contractor?
A. That is right.
Q. Whom does he contract dresses for?
A. For Sheila Lynn.
Q. What is the address?
A. 1400 Broadway.
Q. And during the period of 1939, 1940, 1941 he was such a contractor?

A. That is right.

Q. And he contracted exclusively for them?

A. That is right.

Q. Do you know whether or not Schrader purchased dress materials——

A. No, he gets everything sent in from the manufacturer.

Mr. Entes: That is all.

The Court: Any question, Mr. Falk?

Mr. Falk: No, sir.

[fol. 266] The Court: You are excused.

Mr. Entes: May I ask one question more, your Honor?

The Court: Yes.

Mr. Entes: I am under the impression the witness does not know the answer but I will ascertain it.

Q. Do you frequent the place of your manufacturer after the dresses are sent there?

A. I work inside in the factory. I don't know nothing.

Cross-examination.

By Mr. Falk:

Q. Mrs. Cahman, I just want to be sure you understood the word "exclusively." Did your concern during the years 1939, 1940 and 1941 work for any other manufacturer?

A. No, just for Sheila Lynn. That is all we worked for. For this one manufacturer.

Mr. Falk: That is all.

The Court: By this time I have managed to learn that a manufacturer is a man who does not manufacture and that a contractor is a man who manufactures but does not contract.

Mr. Falk: Yes, that is so, your Honor.

(Witness excused.)

[fol. 267] MAURICE D. STEINDL, called as a witness on behalf of the plaintiff, being duly sworn, testified as follows:

Direct examination.

By Mr. Entes:

The Court: What floor are you on?

The Witness: I am on the 21st floor, the northwest corner.

Mr. Entes: That would be the 20th floor, one sheet from the last, your Honor.

Q. Mr. Steindl, my records here show that you occupied the southeast unit on the 20th floor, which you call the 21st floor, from February 1, 1939 to the present time.

A. That is right.

Q. Did you go on the premises before February 1, 1939? Is that the date you went to the premises?

A. I was there before then.

Q. When did you enter the premises?

A. I think in 1938, December.

Q. December of 1938?

A. Yes.

Q. Now, Mr. Steindl, we are only interested in the years 1939, 1940 and 1941 and the last two months of 1938 and the first two months of 1942, so it is basically three years. During that three-year period what business were you in?

A. I was manufacturing leather goods, belts and leather goods.

[fol. 268] Q. Did you purchase your own materials?

A. That is right.

Q. And what materials did you purchase?

A. Well, we purchased cement, we purchased leather, backing cloth and other items like buckles and things that went into the manufacture of the belts.

Q. From where did you purchase such items?

A. Well, cement we would get—sometimes we would buy from Boston and leather goods mostly in the City of New York.

Q. And some of the other items, buckles, that you mentioned?

A. Sometimes we would get it from New Jersey.

Q. Any other important items?

A. Well, that would be about the basic things that we could use.

Q. Now, you said you manufactured belts.

A. We manufactured belts; we manufactured leather pouches; we manufactured furlough bags, and other kinds of materials.

Q. Now, these belts: Whom did you sell these belts to?

A. Well, we sold them to people out of town, all over, from here to the Coast.

Q. Whom did you sell these leather pouches to?

A. Montgomery, Ward, Sears, Roebuck, from here to the Coast; McLellan Stores and so forth.

Q. Whom did you sell these furlough bags to?

A. McLellan Stores, all the way out of town.

Q. And during this period that I mentioned, three years, a little more than three years, did you sell to those accounts continuously outside the State of New York?

A. Yes.

[fol. 269] Q. They were steady accounts?

A. No; they just developed probably within the last year or two.

By the Court:

Q. Within the last year or two, you say?
A. Yes.
Q. What about 1939?
A. 1939 I did not sell them.
Q. Did you sell any out of town accounts then?
A. Yes.
Q. What city?
A. Chicago.

By Mr. Entes:

Q. And in 1940 did you sell out of town?
A. Yes, we sold some in Chicago.
Q. And in 1941?
A. I presume we did.
Q. Is that your best recollection?
A. Yes.

The Court: Is Chicago the only city you sold outside the State of New York, City of New York?

The Witness: Yes.

Q. Whom did you sell in Chicago?
A. The G. & R. Garment Company.
Q. Any others?
A. That is about the only one offhand I remember.

By the Court:

Q. What volume of business did they take from you?
A. Very little. Practically samples.
Q. They just took samples? Did it amount to more than $100 a year?
A. Possibly.
[fol. 270] Q. About $100 a year. What is your total volume of business?
A. Total volume of business would be about $35,000.
Q. Was that true in 1939?
A. 1939, no, I don't think so.
Q. How much was it in 1939?
A. Probably half.

By Mr. Entes:

Q. Where did you do the bulk of your business in 1939?
A. In the City of New York with the garment manufacturers.
Q. Can you name any of the manufacturers you did work for during that time?
A. In New York?
Q. Yes.
A. Well, Harvey Berin Company——
Q. Just a moment. Harvey Berin?
A. Harvey Berin Company.
Q. Where is that located?
A. 530 Seventh Avenue.
Q. Any other manufacturer?
A. Yes, Blumenstein, 530 Seventh Avenue.
Q. Any other manufacturers; the bulk of your business?
A. The bulk of the business, Miljay.
Q. Then these manufacturers that you named just now received the bulk of your business at that time?
A. Yes.
Q. That is for the years 1939, 1940, 1941; is that so?
A. Yes.

By the Court:

Q. Those belts were not designed especially for particu-
[fol. 271] lar dresses, were they?

A. Why, we call those belts basic belts. They supply us with fabric and we in turn make belts out of them.

Q. So in that respect you were contracting?

A. That is right; but we did supply them with the leather on the belts.

Q. You did supply that?

A. Yes, but they just gave us the fabrics.

By Mr. Entes:

Q. The fabrics they gave you matched identically with the dress?

A. Yes.

Q. Did you see your belts attached to these dresses?

A. I saw them, yes.

Q. Did any one of these manufacturers get the bulk of that business between the three of them or did they get them equally?

A. I would say about two of them were equal.

Q. They got most of it, is that so?

A. Yes.

Q. Which two of the three?

A. Berin and Blumenstein.

Q. Did you frequent these two places?

A. That is right.

Q. To your best recollection how often in days or weeks did you visit such places?

A. About five or six days a week. Every day. Sometimes twice a day. I was very friendly with him.

Q. That is 1939, 1940 and 1941?

A. That is right.

[fol. 272] Q. And when you visited these places did you see your particular belts on their garments?

A. That is right.

Q. And were the garments finished when you saw the belts on them?

A. That is right. The garments would have to be finished before they put the belt on.

Q. You mean your putting the belt was the last step in completing the garment?

A. Yes.

Q. Were buttons on and all?
A. Yes.
Q. It was ready for shipment?
A. Yes, that is right.
Q. Did you see the dresses that had your particular belts on being shipped?
A. I did.
Q. Did you see the containers in which they were placed?
A. That is right, I did.
Q. And did you notice the labelling or marking on the boxes where they were being shipped to?
A. Very often.
Q. Did you notice whether or not they were for accounts and cities outside the State of New York?
A. A lot of them outside the State of New York.
Q. How frequently did you see these dresses being packed with your belts on them?
A. Once or twice a day.
Q. You saw them being packed and received?
A. That is right.
Q. Were you friendly with the shipping clerk there?
A. Friendly with the entire firm. I had the run of the place.
Q. Did you have a conversation with the shipping clerk [fol. 273] while he was packing these dresses?
A. Sometimes I would, yes.
Q. Did you see the original account orders for dresses with your particular belts on?
A. Sometimes we saw them.
Q. Where were these accounts located?

Mr. Falk: I object to it on the ground that it is incompetent, irrelevant and immaterial.
The Court: We haven't got very far.
What is the question?

Q. (Read.)

Mr. Falk: Objection.
The Court: Objection sustained.
Mr. Entes: If your Honor please, may I say at this time for the record——
The Court: How do you expect to bring that in? I don't follow you.

Mr. Entes: We are going to connect up these people with the manufacturers subsequently——

The Court: But you are just going to prove what this man saw on a piece of paper. There is absolutely nothing to lay a foundation for the piece of paper being genuine. He is entitled to cross-examine about it. That is too thin for a court of law. I am going far enough when I let you put in proof that he saw a label. But I do not think I would go any further and let you prove shipments outside the [fol. 274] State because somebody saw a piece of paper which is not in court for anybody to examine.

Mr. Entes: All right, your Honor, we won't follow that line. That will be all, sir.

Cross-examination.

By Mr. Falk:

Q. Mr. Steindl, you say you make a good many kinds of articles like furlough bags and belts. All leather articles, are they?

A. Some. Some are canvas products.

Q. Are most of these products finished products when they leave your premises?

A. They are.

Q. Are they all finished products?

A. That is right.

Q. In the year 1939, 1940 and 1941 did you ship the bulk of your finished products to points within the State of New York?

A. I did.

Q. Did you ship them all to points in the State of New York?

A. No.

Q. How much didn't you ship within the State of New York?

A. I would say about 10, 15 or so.

Q. Where were they sent?

A. Well, they are sent from here to the Coast.

Q. Are they sent direct by you?

A. Sent right to the—either by freight, parcel post or express.

By the Court:

Q. Is that June 1939?

A. No, probably later than that.

[fol. 275] Q. 1940?

A. About 1941.

Q. 1941 that happened?

A. Yes.

By Mr. Falk:

Q. In 1939 did you ship anything outside directly?

A. The only thing I would ship out of town would be belts that came back to us from the various customers out of town to be repaired. We would fix these repairs and we would return them to the customer by parcel post.

Q. You keep talking about belts.

A. Yes.

Q. Are belts the bulk of your business?

A. Belts are the bulk of our business.

Q. Were they substantially all of your business?

A. Oh 90 per cent.

Q. Now, of those belts which you say constitute 90 per cent of your business, did you ship any direct from your place to the points outside the State of New York, except for belts which had come back to you for repairs, or defective belts?

A. 1939? I don't think so.

Q. How about 1940?

A. Probably.

Q. But you don't know?

A. Offhand I would not say yes and I could not say no, but I think I would ship some stuff out to California.

Q. To whom? Wholesalers or retailers?

A. Wholesalers.

Q. Do you know the name?

A. It will probably come back to me a little later.

[fol. 276] Q. What city are they in?

A. Los Angeles.

Q. What was the volume? What was the amount?

A. I would say about $100.

Q. $100?

A. Yes.

Q. Out of your whole business, that is all you can remember?

A. That is all I can remember for the minute, yes, because we have been shipping these—the time may be a hundred this month or a hundred——

Q. Now, let us see. In 1939 your best recollection is that you did not ship any. In 1940 you may have shipped $100 worth?

A. Yes.

Q. Now in 1941 how much did you ship?

A. In 1941 we shipped to Chicago.

Q. To whom?

A. To G. & R. Manufacturing Company.

Q. That is what you answered before, about $100 worth of samples.

A. Yes.

Q. So that your actual deliveries, your completed products that you were selling, you delivered substantially all within the State of New York, didn't you?

A. That is right; about 90 per cent I would say.

Q. Why do you say about 90 per cent? You mean at least 90 per cent?

A. I could just about say it is 90 per cent. We probably must have shipped a thousand or two or three thousand a year. I could not give you that offhand, because two or three thousand dollars worth of business over a period [fol. 277] of 12 months would be straggling.

Q. Yes; so it is only the straggling business, samples and things of that kind that went outside of the State of New York?

A. That is right.

Mr. Falk: All right, that is all.

Re-direct examination.

By Mr. Entes:

Q. Mr. Steindl, you testified when you get belts back that have been damaged, that you ship them directly from your place to those accounts, is that so?

A. Yes.

Q. Where are those accounts located?

A. They are located out of town; we get belts from Marshall Field——

Q. Located outside the State of New York?

A. Yes.

Q. How frequently do you get such repairs?

A. A few times a week.

Q. And during the period of the year does that comprise a good part of your work?

A. Well, it is part of our service. We have to repair the belts. We repair them or replace.

Q. You have men who have to do that work, is that so?

A. That is right.

Q. And you say they come in about two or three times a week?

A. Yes.

Q. And that is throughout the year, is that right?

A. That is right.

Q. And that is 1939, 1940 and 1941, is that so?

A. Yes, that is right.

[fol. 278] Q. So you were constantly making repairs at least twice a week for out-of-town customers outside the State of New York?

A. That is right.

Q. And you are sure of that?

A. Positive.

Q. And that was part of the services which you rendered for the manufacturers whom you worked for?

A. That is right. Every belt would have a particular style about it, and we knew how to refer to it. The style number would be put on the back of the belt.

Q. And in repairing of these belts, you put things on the belts such as buckles or any type of material that had to be attached?

A. That is right, or we would make it larger for them, the size larger.

Q. Then you would ship them out in your own containers, your own packages?

A. That is right.

Q. You would tie them and label them?

A. Sometimes we would send it direct to the firm we do business with and they would have the store label on them.

Q. And would you ship it——

A. Then we would ship that back to our particular account and then they would send it to the customer.

Q. You made some shipments to these out-of-town firms, is that right?

A. That is right.

Q. And how frequently did you make those shipments out of town yourself?

A. Oh, their ain't a week that don't go by that we didn't [fol. 279] have some.

Q. That you shipped directly out of town?

A. Yes.

Q. You say every week you do that?

A. Yes.

By the Court:

Q. But you did not do that in 1939, 1940 and 1941?

A. Always.

Q. Always did that?

A. Yes.

Q. On the repair business?

A. Yes. That is a regular service.

The Court: All right.

Mr. Entes: That will be all.

Recross-examination.

By Mr. Falk:

Q. Were these belts that you shipped out that way belts that had left your place once before?

A. That is right.

Q. Did you bill for them when they went out the second time?

A. No, we did that because we manufacture all the belts for these particular accounts and in that respect we service them with their customers.

Q. So these belts were produced by you on some prior occasion and shipped out by you, and the same physical articles returned for some sort of service, in most instances sent back in the City of New York to the people from whom you got the order, but in a few isolated cases sent directly out of town, is that correct?

A. I did not say that. I says invariably we would get [fol. 280] that from out of town; we would ship it out of town just as often as we would get it from the manufacturer, and they do their own shipping.

Q. But they were never articles that you were sending out for the first time, were they?

The Court: Naturally not. He said so.

Mr. Entes: Your Honor, may I object on the ground that it is highly immaterial and irrelevant, whether or not he sent it out the first or second time.

Mr. Falk: I move that all the testimony relating to this repair work be stricken out on the ground that it can't possibly be said that it was produced for interstate commerce. They were not produced.

The Court: I will reserve decision on that.

Mr. Falk: That is all.

The Court: You are excused.

(Witness excused.)

The Court: Adjourned to 10:30 tomorrow morning.

(Adjourned to December 17, 1943, 10:30 a. m.)

[fol. 281] SALVATORE GANGI, etc.

vs.

D. A. SCHULTE, INC.

New York, December 17, 1943;
10:30 o'clock a. m.

Trial resumed.

CARL HIRSHORN, called as a witness on behalf of the plaintiff, being duly sworn, testified as follows:

Direct examination.

By Mr. Entes:

Q. Mr. Hirshorn, are you employed by Harvey Berin?
A. Yes, sir.

Q. And are they located at 530 Seventh Avenue, Borough of Manhattan, City of New York?
A. Yes.

Q. And were you in such employ during the period of October 24, 1938 to February 5, 1940?
A. Yes.

Q. During that period?
A. Yes.

Q. And were you familiar with the business of your employer during that period?

A. Yes.

Q. And do you have Maruice D. Steindl as a belt manufacturer?

A. Yes.

Q. For the dresses of your employer?

A. Yes.

Q. And was he such a belt producer or manufacturer for your employer's dresses during the period 1938 to 1942?

A. Yes.

[fol. 282] Q. And are you familiar with the sales of the particular dresses on which these belts were put on?

A. Yes.

Q. And can you tell the Court in your own words where these dresses were sold and shipped to during that period?

Mr. Falk: If he knows.

Q. If you know.

A. Yes, I do. Practically in every city in the country——

Mr. Falk: Before you answer, Mr. Witness, I make my same objection I made in other situations similar to this, your Honor, that the witness should be qualified as to his knowledge. He has not even testified what the job is that he holds there. He just says he is employed.

The Court: Very well. The objection is well taken.

Q. What is your position?

A. Salesman.

Q. And as a salesman are you familiar with the selling and shipping of dresses to your accounts?

A. Yes.

Q. And were you such a salesman during the 1938-1942 period?

A. Yes.

Q. And you knew of these sales and the shipping of the dresses that Maurice D. Steindl put belts on?

A. Yes.

Q. During that period?

A. Yes.

Q. Where were these dresses sold and shipped to?

A. Practically in every State of the country.

Q. Were these accounts in different States of the United [fol. 283] States steady, continuous accounts during that period?

A. Yes.

Mr. Entes: That will be all.

Mr. Falk: Just a minute, please.

Cross-examination.

By Mr. Falk:

Q. Did you sell any dresses to Oklahoma?

A. Yes.

Q. Where?

A. Oklahoma City.

Q. What is the name of the concern there?

A. Kerr Dry Goods.

Mr. Entes: If your Honor please——

The Court: Are you objecting?

Mr. Entes: I do not object to the line of questioning as it has progressed so far. But I do not think he should disclose the names—they may be confidential secrets——

The Court: I am sorry; there is no such thing as secrets in a court of law.

Mr. Falk: As a matter of fact, I think one reason these contractors are not in a position to say where these goods go——

The Court: He is not a contractor. He is a manufacturer.

Mr. Falk: But I am talking now of the contractors. They do not know and are not supposed to know where the goods are going.

[fol. 284] Mr. Entes: If your Honor please, let him confine himself to this particular manufacturer.

Mr. Falk: That is what I am doing. I am just answering your comment.

The Witness: Ballietz is another account we have in Oklahoma City.

Q. Mr. Hirshorn, are you the sales manager of your organization?

A. Well, we have two salesmen. I am one of them.

Q. You are one of two salesmen?

A. That is right.

Q. Do you travel?

A. No.
Q. Do you stay in New York all the time?
A. Yes.
Q. Are you an officer of this corporation?
A. No, sir.
Q. A director?
A. No, sir.
Q. A stockholder?
A. Just a salesman.
Q. Are there *there* gentlemen who are your superiors in that place of business?
A. The only superior is the boss, the owner.
Q. What is his name?
A. Harvey Berin.
Q. Does he own the company?
A. Yes.
Q. And he is there actively directing its affairs?
A. Absolutely, yes.
Q. Have you got other belt contractors besides Mr. Steindl?
A. As far as I know, no.
Q. He makes all the belts?
A. Practically all the belts.
[fol. 285] Q. Do all of your dresses have belts on them?
A. Not every one. Sometimes we have a dress that hasn't got one.
Q. What sort of merchandise do you carry? How would you describe it? Ladies' wear?
A. Ladies' wear, that is right.
Q. Well, you know more about that business than I do. Tell me what kind of goods you carry. If I were a buyer from out of town I would say, "What do you carry? What is your line?"
A. We have a better line of merchandise ranging from $17.75 to $29.75.
Q. What are they, winter clothes and summer clothes?
A. In different times of the year we have different kinds of clothes. We have suits, dresses, both.
Q. Do the suits contain belts?
A. Sometimes, yes.
Q. Isn't it very rare? Yes or no, please.
A. No, it is not rare.
Q. It is not?
A. No.

Q. What does a woman's suit consist of?
A. Skirt and a jacket.
Q. Isn't the jacket usually quite short?
A. Yes.
Q. Do very short coats like that contain belts?
A. Many times, yes.
Q. Now, when you say "many times," do you mean half the time?
A. It all depends on the type of style. If it is a princess [fol. 286] silhouette it does not need a belt. If it is a regular jacket it has a belt.
Q. I am asking you whether in considering the styles and everything else, half of the suits that you sell contain belts; do as many as half of the suits contain belts?
A. I could tell you exactly how many belts in dollars and cents we have used from him since 1938.
The Court: That is not the question.
Q. I asked you how many suits that you sell contain belts.
A. That I don't know.
Q. Are there as many as half?
A. Yes, I will say that.
Q. You think half the suits?
A. Yes.
Q. And you say you also sell dresses and coats?
A. Dresses and suits.
Q. Dresses and suits?
A. Yes—belts go mostly on the dresses. The biggest part of our business is dresses. I will say 90 per cent of our business is dresses. 10 per cent is suits.
Q. What percentage of dresses contain belts?
A. Well, I will say 95 per cent.
Q. Are those leather belts or textile belts?
A. Sometimes they are leather and sometimes they are bound with cloth, soft material.
Q. Do you get all your belts from Mr. Steindl?
A. Yes.
Q. All of them?
A. Practically all of them. Sometimes they make it on [fol. 287] a lot to other people, but he gets practically; I will say, 95 per cent of the business.
Q. Of the contracting business?
A. Of the belt business.
Q. How about during these years 1939, 1940 and 1941?

Was that the situation then?

A. That is right.

Q. You have just stated as an afterthought that sometimes they give out contracts for belts to other concerns, didn't you?

A. That is right.

Q. What are those concerns?

A. I would not know.

Q. You would not know the names of the other contractors?

A. I know he has been our main belt man for 15 years, not since 1938.

Q. You have nothing to do with giving out those orders, have you?

A. Nothing to do with the orders. No, I have nothing to do with giving them out.

Q. Your job is just selling merchandise after the designs have been made and the orders have been placed and the merchandise has been manufactured, is that right?

A. That is right.

Q. You are concerned with getting the orders?

A. That is right.

Q. It is not your part of the job to find out who the contractors are or what work they do?

A. That is right.

Q. Now, during these years 1939, 1940 and 1941 do you know how many of the garments sold to this Oklahoma [fol. 288] City concern contained Mr. Steindl's belts?

A. I could not tell you truthfully.

Q. Isn't is possible—"possible" remember I said—that none of the garments sent to Oklahoma City in 1939, 1940 and 1941 contained a single belt made by Mr. Steindl?

A. No.

Q. That is not possible?

A. No.

Q. Why not?

A. Because I should say—as I said, practically 95 per cent of the dresses may have belts.

Q. Now, let us do a little arithmetic, then. What was your volume of business in 1939?

A. I would not know that.

Q. What was your volume of business in 1940?

A. I don't know about the volume.

—. What was your volume of business in 1941? You don't know that?

A. No.

Q. You don't know the volume of business at all?

A. Not the exact figures, no, sir.

Q. Do you know the approximate figures?

A. I won't say because I really don't know.

Q. Do you know what percentage of your gross sales in 1939 went to this concern in Oklahoma City?

A. Oh, very little.

Q. Did 10 per cent go?

A. No.

Q. Then how do you know that among the 10 per cent [fol. 289] of your sales that did not contain belts, then, were not all the orders for Oklahoma City?

A. I don't quite follow that question.

Q. You have testified it is not possible that none of Mr. Steindl's belts went with your merchandise to Oklahoma City in 1939. Is that your testimony? That it is not possible, not a physical possibility?

A. Not a physical possibility what?

Q. That none of his belts went to Oklahoma City in 1939.

The Court: Do you follow the question?

The Witness: I really do not.

The Court: Let me reframe it for you:

By the Court:

Q. You said or did you say—and you tell me yes or no—you said it was utterly impossible for your customer in Oklahoma not to have received some of Steindl's belts in his order in 1939?

A. I could not answer that.

Q. You don't know?

A. No.

Q. In other words, you say there is a possibility that he may not have received any belts?

A. You mean Oklahoma City?

Q. This particular account. That no Steindl belts were in his orders.

A. It is possible.

Q. It is possible?

A. It could be.

[fol. 290] The Court: It could be. All right.

By Mr. Falk:

Q. Now, wouldn't that same answer apply to any specific customer that I might ask you about?

A. Yes.

By the Court:

Q. Could it apply to all the customers?

A. No.

Q. Could it apply to 50 per cent of the customers?

A. No.

Q. 25 per cent of the customers?

A. Practically all the belts are made by him, see——

Q. And 90 per cent of your merchandise has belts;

A. That is right.

By Mr. Falk:

Q. Do you have accounts in New York City?

A. Yes.

Q. And others in cities of New York State?

A. Yes.

Q. Do you handle those yourself?

A. I handle them generally. I handle them in every part of the country.

Q. How do you and your brother, salesman up there divide up your work.

A. We don't divide it. We take them as they come in.

Q. You do all your selling right in the premises?

A. That is right.

Q. Now, you have buyers come in from Buffalo, Rochester and other cities in New York State?

A. Yes.

Q. Do you sell to concerns in all of those places?

A. Yes.

[fol. 291] Q. And do you sell to department stores in New York City?

A. Yes.

Q. Do you sell big quantities here, locally?

A. I don't know.

Q. What percentage of your business in 1939 was with concerns in New York City?

A. I could not give you any definite information.

Q. You don't know?

A. No.

Q. Do you know what percentage of your sales in 1939 was to concerns in places other than New York City and New York State?

A. Most of our business is done outside of New York City and New York State. Most of it.

Q. Well, I am asking you what the percentage of your business——

A. The percentage I don't know.

Q. You have no idea?

A. No.

Q. When you sell to concerns outside of New York City, have you sometimes made shipments to them within the State of New York? Do you understand the question?

A. Yes, sometimes we do.

Q. For instance, if you sell to, let us say, Marshall Field, just as an illustration,—do they sometimes instruct you to deliver to their warehouse in New York?

A. No, not Marshall Field.

Q. Well, does Montgomery, Ward——

A. No; we have other types of accounts that we do that sometimes.

[Tol. 292] Q. You do that sometimes?

A. Yes, sometimes.

Q. Is it quite frequent?

A. Well, for that particular account it is always that way.

Q. There are some accounts that always have you deliver right in the State of New York, is that right?

A. They have a New York office. If they have a New York office we ship to the New York office and they distribute it.

Q. Now, we begin with this proposition, do we, Mr. Hirshorn, that so much of your sales that are to concerns located within the State of New York you ship within the State of New York; you have not any doubt about that, have you?

A. There are a few, yes.

Q. What do you mean a few? Is there any exception?

The Court: For New York customers you ship to their New York addresses?

The Witness: Oh yes; surely.

Q. So you start out with that; whatever you sell to concerns in New York you ship wholly within New York; isn't that so?

A. That is right.

Q. And then you proceed to cases where you get orders and purchases from concerns outside the State of New York that instruct you to ship to points within the State of New York; isn't that right?

A. That is right.

Q. Do you know what percentage of your gross business you ship within the State of New York?

A. I would not know that, no, sir.

[fol. 293] Mr. Falk: That is all.

The Court: You do not want any more, do you?

Mr. Entes: No.

(Witness excused.)

Selma G. Waller, called as a witness on behalf of the plaintiff, being duly sworn, testified as follows:

Direct examination.

By Mr. Entes:

Q. Miss Waller, are you employed by Mairell Dress Company, 530 Seventh Avenue?

A. That is right.

Q. What is your position?

A. My position is sales girl.

Q. Your position is sales girl?

A. Yes.

Q. And as such sales girl are you familiar with your accounts of your customers out of town?

A. That is right.

Q. And as such sales girl are you familiar with the dresses and styles of the dress contractors who make dresses for Mairell Dress?

A. I am.

Q. And are you familiar with the shipment of those particular dresses?

A. To some extent, yes.

Q. Does each contractor who makes dresses for Mairell Dress, if there are more than one, make a particular style or pattern?

A. Yes, they do.

Q. So can you state to the Court that you can recognize a certain contractor's dress because of a particular style [fol. 294] number of that dress?

A. That is right.

Q. And during the years of 1938 to 1942 did the Mairell Dress have more than one contractor?

A. Yes.

Q. And was one of those contractors the Ceilin Dress Company?

A. That is right.

Q. Also known as Vincent Giamberdini of 575 Eighth Avenue, Borough of Manhattan, City of New York?

A. That is right.

Q. And did Mr. Giamberdini manufacture a dress for a particular style from patterns for your employer?

A. Yes.

Q. And you stated you are familiar with the accounts and where these dresses are sold and shipped to?

A. Yes.

Q. Are you familiar with the sales and shipments of the Vincent Giamberdini's dresses that he made, that particular contract?

A. No; I do not know that as an individual.

Q. But you knew his dresses?

A. Certainly.

Q. And were his dresses and other contractors' dresses sold and shipped to points outside of the State of New York?

Mr. Falk: I object to the question.

The Court: Objection sustained.

Q. Do you know where these dresses were sold and shipped?

The Court: Which dresses?

Q. Do you know where the dresses were sold and shipped——

Mr. Entes: Your Honor, I want to make a point.

[fol. 295] Q. Do you know where the dresses were sold and shipped of all the contractors, including Vincent Giamberdini's?

Mr. Falk: I object to the question unless the proper basis is laid.

The Court: What is the significance of where dresses other than Giamberdini's went to? I do not follow it.

Mr. Entes: I just want to show general knowledge by her position in the place.

The Court: Let us get down to Giamberdini. I am not interested in the others. Lay a foundation for her capacity to testify, for her opportunity to observe. I do not want hearsay and I do not want surmises or guesses. We have been all through that. This is the third or fourth day we are at it. By this time we ought to have a pattern of procedure.

Mr. Entes: Yes.

Q. You knew the dresses of Giamberdini by the particular style during these years?

A. That is right. Different contractors are given different styles.

Q. I am only confining it to the Ceilin dresses. Did you see the Ceilin dresses at your place of employment during those years? Did you see those dresses?

A. Certainly.

Q. And did you recognize those dresses?

A. Well, certainly.

[fol. 296] Q. And did you recognize them by the styles?

A. By the styles.

Q. And you knew which styles the Ceilin Dress is making for your employer?

A. Well, yes.

Q. During 1939, 1940 and 1941?

A. Yes.

By the Court:

Q. Did you ship the dresses yourself?

A. No, I don't ship them; but I sell them.

Q. To whom did you sell them, to visiting buyers?

A. That is right.

Q. Where were these visiting buyers from?

A. From everywhere in the United States.

By Mr. Entes:

Q. And did these visiting buyers come in frequently to purchase these Giamberdini dresses?

A. That is right; every season.

Q. And they were continuous accounts during the years?

A. Yes.

Mr. Entes: That is all.

Cross-examination.

By Mr. Falk:

Q. Miss Waller, what are your hours of employment down there?

A. From 9:30 to 5:30.

Q. Do the buyers start coming in at 9:30 sometimes?

A. Only occasionally. They don't start coming in until [fol. 297] about 10:30.

Q. What do you do until 10:30?

A. Nothing but make myself beautiful, I guess.

Q. With considerable success. Do you go out and supervise the shipping when you get there at 9:30?

A. No. I have not done that, but I have an assistant in the shipping room to a certain extent helping me to pick out orders.

Q. They have a regular shipping department?

A. That is right.

Q. And you have a regular shipping clerk?

A. Yes.

Q. If something is shipped to the wrong place you do not get the devil, do you? Somebody else does?

A. Yes.

Q. How late do you work there?

A. Till 5:30.

Q. And the buyers keep you very busy up till that time?

A. In season every minute. There are times, approximately a month when we won't see one.

Q. You have your hands full selling, don't you?

A. Yes.

Q. And that is your end of it?

A. That, and I do assist in the picking with duplicates from these contracts.

Q. You assist in picking out orders sometimes?

A. That too.

Q. Now, have you ever actually supervised the shipment—that is, turning over any boxes to any express company?

A. No.

[fol. 298] Q. Or any transfer agent or anything like that?

A. That is not my department.

Q. They would be too heavy for you to handle anyway, wouldn't they?

A. Yes.

Q. Do you go out there and check up the labels on the boxes to see that the shipping clerk has done his job properly?

A. No.

Q. He would not like it very much if you did, would he?

A. No.

Mr. Falk: That is all.

(Witness excused.)

Mildred Marks, called as a witness on behalf of the plaintiff, being duly sworn, testified as follows:

Direct examination.

By Mr. Entes:

Mr. Entes: Yes, your Honor, this is the 9th floor.

Q. Miss Marks, are you employed by the Star Stitching Manufacturing Corporation, also known as the Star Pleating Corporation?

A. That is right.

Q. We have here that they were located on the entire 9th floor from February 1, 1937, I think, to the latter part of 1942.

A. That is right.

Q. And you are still on the 9th floor, is that so?

A. That is right.

Q. What was your position with these corporations?

[fol. 299] These corporations—it is the same corporation, are they not; I mean they are subsidiaries——

A. I am the bookkeeper there.

Q. And as such bookkeeper are you familiar with the general nature of the business and the accounts of that business?

A. I am.

Q. From the period of October 24, 1938 to February 5, 1942?

A. I am.

Q. I mean, you were during that period?

A. I am working, yes.

Q. And will you please tell the Court in your own words what the nature of the business was at that time during those years?

A. Well, we do pleating, stitching and embroidering for the dress trade.

Q. And this pleating, stitching and embroidering where is this dress trade you do it for? Where is it located?

A. In New York City.

Q. And during those years you were contractors for these people, is that so?

A. Yes.

Q. What did you do, put the embroidery on the dresses?

A. That is right.

Q. And you pleated the dresses?

A. We make the trimmings.

Q. You make all the trimmings that go on the dress?

A. Yes.

[fol. 300] By the Court:

Q. And the material is supplied to you by the manufacturer?

A. Yes.

Q. And you supply your services?

A. Yes, we put the labor.

Q. You put the labor of pleating and stitching and embroidery?

A. Yes.

Q. And you return the merchandise?

A. Yes.

Q. Now, who were your principal customers?

A. Well, we had about 100 or 150 customers.

By Mr. Entes:

Q. Let us make the record clear. We are only concerned with 1939, 1940 and 1941. Was your business distributed among 100 customers or distributed in bulk among a few? I mean, did any particular customer get a good part of your business?

A. Well, we had a few which made up the major part of the business.

Q. Tell me the names of some of these manufacturers or jobbers, whoever those were, and addresses, with whom you did the bulk of your business.

A. Well, A. Goodman.

Q. And do you know the address of A. Goodman?

A. Five thirty seven.

Q. What do they manufacture?

The Court: "Five thirty seven?" Is that an address?

[fol. 301] Mr. Entes: 530 Seventh Avenue.

The Witness: And Ed Gerrick.

Q. What is the address?

A. 550 Seventh Avenue.

Q. Any other?

A. I could name dozens.

Q. Did the bulk of your business consist——

The Court: The whole hundred were located in the City of New York?

The Witness: All in the City of New York.

Q. Were those two a big portion of your business?

Mr. Falk: I object to the question on the ground that a big portion is too vague a term.

The Court: Yes.

Q. What portion of your business did these two comprise?

Mr. Falk: If she knows.

Q. If you know.

A. I can't say.

Q. To the best of your recollection, I mean. You can approximate, if you can tell. Can you remember at all?

A. I do remember that A. Goodman did a very, very big business with us.

Q. A. Goodman was your biggest customer at that time?

A. At that time.

Mr. Falk: I move that it be stricken out unless the witness can explain what she means by a very big business.

The Court: Maybe she can. Can You? Do you know [fol. 302] what volume of business you did with A. Goodman?

The Witness: Well, there was one month I remember distinctly that we did $10,000 with them.

Q. How much business did you do a year, that particular year?

A. Well, we averaged from $200,000, $250,000.

Q. And you did $10,000 with one account that month?

A. Yes.

Q. And that particular year when you sold $10,000 to one customer, have you any idea roughly what you sold to that customer for the entire year of which $10,000 was one month's business; roughly speaking, general figures?

A. No, I can't.

By the Court:

Q. It wasn't 12 times 10?

A. No.

Q. Was it 5 times 10?

A. No.

By Mr. Entes

Q. Can it be 2 times 10?

A. Possibly 2 times 10 for the entire year.

Q. So that was about $20,000 or so?

Mr. Falk: The witness said "possibly."

The Court: She does not know.

Q. Was the rest of the business for the entire year for that particular customer more than that one particular month, do you know? I mean; did the rest of the business for the other 11 months——

A. I can't remember that. It was outstanding to me, to [fol. 303] my mind, because of that, because we did that much business with them for that one month.

Q. If you can remember—if you can't just say you can't—but if you can remember, can you say that the other 11 months were equal or more or less than that particular one month's business?

A. I can't say that.

Q. You don't remember?
A. No.

By the Court:

Q. $10,000 a month with one customer is an outstanding event in your memory?
A. Yes.
Q. It is unusual for you to do that volume with any one customer?
A. Yes.
Q. Most of them run in fairly small amounts?
A. Well, not fairly small, but they average a thousand or two thousand a month in season. When I talk about it, I talk about it in season.

By Mr. Entes:

Q. Have you any idea of the approximate amount of business you got from A. Goodman, say, in 1939 or 1940?
A. No, I could not.
Q. Do you know whether it was much larger than that of any other of your accounts?
A. You mean if they did more business——
Q. If the business they did with you was much larger [fol. 304] than any of your other accounts?
A. I don't remember.
Q. You said you do approximately $200,000 a year business?
A. That is right.
Q. I am now confining myself to the particular years of 1939, 1940 and 1941. I mean not before or after. Was that for those years, rough figures?
A. Yes.

Mr. Entes: All right, that is all.
Mr. Falk: No questions.

(Witness excused.)

SIDNEY STEGMAN, called as a witness on behalf of the plaintiff, being duly sworn, testified as follows:

Direct examination.

By Mr. Entes:

Q. What is your name?

A. Sidney Stegman.

Q. Mr. Stegman, are you employed by Herman Beispel, Inc. located at 550 Seventh Avenue, City and State of New York?

A. Yes.

Q. And were you employed during the period 1939 to 1941?

A. Yes.

Q. And the beginning of February 1942?

A. Yes.

Q. What is your position of employment there?

A. When I started to work for Herman Beispel in 1940 for two years I was doing the shipping.

Q. With the shipping department?

A. Yes, charging.

Q. When did you first go to work for Herman Beispel, [fol. 305] Inc.?

A. In November 1939.

Q. November 1939?

A. Yes.

Q. And you were head of the shipping department?

A. That is right.

Q. And are you such head of the shipping department at the present time?

A. Well, for the last two years, being that I can't get anybody to do any packing, so I occasionally do some charging but not all day long. I have one of the girls doing the charging and I do all the packing and marking and ship the merchandise.

Q. But we now want to confine ourselves to 1939, 1940 and 1941, if you know about those particular years. Now, in those particular years were you familiar with the accounts?

A. That is right.

Q. Of Herman Beispel?

A. I must have. I had four books to control.

Q. Did Herman Beispel, Inc. have a contractor by the name of Raizen of 571 Eighth Avenue?

A. That is right, Raizen & Trager.

Q. Borough of Manhattan, City and State of New York?

A. Yes.

Q. And did the firm of Raizen & Trager have a particular style or design number for their particular dress for your employer?

A. Well, they made several styles.

[fol. 306] Q. I mean, were these styles as a rule that they made different from other contractors'?

A. Entirely different from the others.

Q. And you were able to recognize these particular dresses of Raizen & Trager?

A. I certainly did.

Q. And when you made your shipments for your employer of Raizen & Trager dresses, you recognized those dresses as they were being shipped?

A. Yes, sir.

Q. And do you know where those dresses were shipped during that period?

A. Absolutely.

Q. Will you please tell the Court where those dresses were shipped to?

A. Well, it was shipped out of New York. At least, I should say about 90 per cent.

By the Court:

Q. Out of New York City?

A. Out of New York.

Q. Out of New York City or out of New York State?

A. Out of New York City.

By Mr. Entes:

Q. Were they shipped all over the United States?

A. Pretty near coast to coast, north and south.

Q. Were they shipped to nearly every State of the Union?

A. Pretty near.

Q. And were these steady, reliable accounts of Herman Beispel?

Mr. Falk: I object to that question.

[fol. 307] The Court: You mean reliable as credit——

Mr. Entes: I will strike that out.

Q. Were they steady, continuous accounts?

A. They are.

Mr. Falk: I object to that on the ground that it would not necessarily be connected up with Raizen & Trager dresses. Accounts might be very steady and they might say, "Don't give us any more of those Raizen & Trager dresses."

By the Court:

Q. Did you regularly ship Raizen & Trager dresses to these customers?

A. We did.

Q. You did?

A. Yes, I did. Could I mention, we have four factories. They would go in with their shipments.

Q. I understand. But you knew there were Raizen & Trager dresses in those shipments?

A. Yes.

Mr. Entes: That is all.

Cross-examination.

By Mr. Falk:

Q. What were your duties there, Mr. Stegman, in 1939, 1940 and 1941?

A. Shipping clerk; head of the shipping department.

Q. You were not a designer, were you?

A. No.

Q. Were you an officer of the company?

A. No, sir.

Q. Were you a contractor?

A. No, sir.

Q. Were you a stockholder?

A. No, sir.

Q. Did you have any bosses there?

A. I have a boss.

[fol. 308] Q. What is his name?

A. Mr. Herman Beispel.

Q. Does he own the business?

A. That is correct.

Q. Is he active on the job?

A. He is.

Q. Did he have designers?

A. Well, in that year he had a designer, but he is doing all the designing now.

Q. Does he have a salesman?

A. Yes.

Q. More than one?

A. About four.

Q. How big a place have you got there?

A. The entire 22nd floor.

Q. How big is that, approximately? Is that a square block or half a square block?

A. I could not tell you exactly how many feet it is, but it is a very large loft.

Q. It is divided into various departments?

A. That is right.

Q. What are these departments?

A. Piece goods department, packing, shipping; we have a place where all the merchandise is assorted for the customers; and we have a pattern room, and we have Mr. Beispel's little factory where he designs the clothes.

Q. You have a shipping room?

A. We have a shipping room.

Q. Is that off by itself?

A. It is right in the center of the floor.

Q. Is that the place from which the packages or boxes [fol. 309] are turned over to the express company?

A. No, sir. There is another room there where the packing is done. This square room is where all the merchandise after being assorted is taken out on a rack and charged to the various customers. Originally, as they come in from the factory they are examined and then put away to each customer's account number. Then they are charged. We take out six or eight garments for a customer—maybe Randall Bros. in San Francisco—and we just turn to that page and charge them up.

Q. You made some reference to the manpower shortage. You have got to do a good many things these days you did not do before?

A. That is correct.

Q. That was not so in 1939, 1940 and 1941, was it?

A. No.

Q. You had all the help you needed?

A. I had two boys; that is correct.

Q. What did you actually do in those three years in this process of shipping——

A. It is my duty as the head of the shipping department, the head shipping clerk, to follow up the orders. The first

thing in the morning, I used for an hour or two go out to the various factories and see that I get my merchandise in, and this merchandise used to come in at night, and it was examined in the morning and then assorted, and then [fol. 310] I had the charging, and I had the boys there packing.

Q. You say you had four contractors—what did you call them, factories?

A. Factories are contractors. They are really contractors. They work exclusively for Herman Beispel.

Q. Raizen & Trager you call a contractor?

A. Yes.

Q. And you had three other contractors of the same sort during those three years, 1939, 1940 and 1941, right?

A. Yes

Q. What percentage of the goods that you bought came from Raizen & Trager?

A. Well, it is according to what styles they have; but on the average I would say that each factory could send in if the merchandise is a little easier, if that article didn't have to wait for embroideries to come in, they could turn out an average of 100, 175 a week.

Q. I am asking you a very specific question, not from what you surmise from your general experience or from the law of averages or anything else. I am asking you if you know. If you don't know, just please say so. What percentage of the goods that were made for you by contractors in 1939, 1940 and 1941 were made for you by Raizen & Trager?

A. About a quarter of it.

Q. You say a quarter. Could it have been substantially [fol. 311] less in any one of those years?

A. No.

Q. So you are sure it was about a quarter?

A. It is about a quarter because I get the list from the office and I know what each factory sends in at the end of the week.

Q. Have you looked at those lists preparatory to coming in and testifying?

A. No.

Q. You are testifying entirely from memory?

A. Because I will tell you why I could say that. When these factories send in their garments during the week, at the end of the week I get a list from the girl in the

office what each individual contractor sends in and I have got to give him back so many hangers.

Q. Do you have any other contractor besides these four?

A. Not in my time.

Q. What are the names of the other three?

A. Commercial on West 27th Street; there is Shalewitz & Klinetzky, I think they are 347 West 39th; and there is Belon, 260-264 West 40th Street.

Q. I notice when you gave the names of these three other contractors you hesitated on the first one; as to the second one you used the words "I think", and as to the third one you gave a number and then corrected yourself. Does that mean that you were not thoroughly familiar with where they are located?

[fol. 312] A. I am, but for a moment I wasn't sure of the addresses.

Q. Do you go to all four of them every morning?

A. Pretty near every day.

Q. Do they all make about an even amount of stuff for you?

A. Pretty close. As I explained, some garments are harder, and they have to wait for embroidery. Where one factory can send 150, the other will turn out 100 or 110.

Q. In those three years did you have any other contractor at all besides those three whose names you have given?

A. Not that I know of.

Q. Could there have been a contractor that you did not know?

A. I really don't know.

Q. You mean as far as you can remember?

A. As far as I can remember; not in my time.

Q. Those three years were in your time, weren't they?

A. That is right.

Q. And you mean you have not gone back to the records; you are testifying from your best recollection?

A. That is correct.

Q. And that according to your best recollection there was not any other conractor?

A. No other contractor.

Q. But there might have been?

A. No, sir.

Q. Then you are testifying that there surely was no other contractor?

A. There was no other contractors in my time which [fol. 313] I was with Herman Beispel.

Q. Now, when you got these garments in, you placed them where in your premises?

A. They come in at night.

Q. What do you do with them?

A. They are put on racks, and the next morning they are examined by our examiner; and then there is a distribution book.

Q. When you pack them you don't always have the garments from one contractor in separate containers, do you?

A. No, sir.

Q. You mix them up with various others?

A. Various styles from the four factories.

Q. Did you in those three years have any accounts inside of New York City?

A. Very little.

Q. Did you have any in New York State?

A. We did.

Q. Whereabouts?

A. Buffalo.

Q. Where else?

A. Schenectady.

Q. Did you ever have any in Albany?

A. In Albany.

Q. Syracuse?

A. Syracuse.

Q. Rochester?

A. Pretty near all up there.

Q. Do you pay particular attention when you are handling the shipment whether a particular shipment goes to New York State or to some other State?

A. It is according to where the customer is located.

Q. But it is not of any significance to you what State it goes to, is it?

A. I don't know what you mean.

[fol. 314] Q. Well, did you have any special reason for remembering how many went into the State of New York or how many went out of the State of New York?

A. No.

Q. You did not, did you?

A. No.

Q. It was all the same to you whether you shipped something to Buffalo or to Pittsburgh, wasn't it?

A. Even to the Coast. Whatever we had ready for that day's shipment went, that's all.

Q. Now, did you ship to any concerns that were located out of the State of New York to points within the State of New York? In other words, did any concerns that were located, let us say, in Chicago or St. Louis,—have you shipped their merchandise to points inside of New York City or New York State?

A. You mean an out-of-town firm that had a New York office?

Q. Yes.

A. Yes.

Q. Were there many of those?

A. No, sir.

Q. Which ones, do you remember?

A. Well, there is Livingston Bros. in San Francisco. They have a New York office at 1450. You can't ship no goods unless you send it to the New York office. They in turn instead of sending out one package by express, which would be about $1.10, they bunch it and tie a string around them and send out for the same $1.10, they ship maybe 60 pounds.

[fol. 315] Q. Did you sell for these three years to I. Mangin & Company?

A. No, sir.

Q. Did you send to any of the mail order houses?

A. We didn't sell mail order houses.

Q. Do you remember what percentage of your gross shipments went to points within New York State in 1939?

A. About 10 per cent.

Q. How do you compute that?

A. Because the bulk of our business is done past the Eastern States to the Coast; Detroit, Chicago, Oklahoma.

Q. What percentage is done in New York City or was done in 1939 in New York City?

A. Well, to tell you the truth, very little has been sold in New York City.

Q. So the 10 per cent that you estimate is mostly to points in New York State, outside of New York City?

A. I should say about 15 per cent New York and New York City.

Q. 15 per cent?

A. Yes.

Q. Now, does that include an account like Livingston in San Francisco where you ship to them through their New York City office?

A. Well, I will tell you, to be frank, Livingston Bros. would place an order, and you would not hear much from them, and the rest of the merchandise would go to the New York office; and providing it is on a Saturday when they are closed, if you call them up, they would grant you [fol. 316] permission to send the package out direct by express.

Q. I am asking you, sir, whether in your estimate which you now raised from 10 to 15 per cent you have included merchandise sent to points outside of New York City but shipped to points inside of New York City?

A. Very few.

Q. Have you included that in your estimate of 15 per cent?

A. No.

Q. What percentage would that be that we must add to the 15 per cent?

A. It would not be much because they are not such big users.

Q. Would you give us your best estimate, or don't you know?

A. I really could not tell you.

Q. You don't know what percentage was shipped where?

A. When I was charging the merchandise there was about 85 to 90 per cent of the merchandise past New York State, down South.

Q. Now, when you say percentage, are you concerned in the shipping department with bulk, with physical bulk, or are you concerned with relative values, or what?

A. With bulk, in garments.

Q. When you say percentage of shipments, what do you mean, of the dollars or the number of garments?

A. The number of garments.

[fol. 317] Q. And that is what you are concerned with?

A. That is right; number of garments.

Q. Now, isn't it a fact that in your business there would be years when, say, Livingston would order a lot more than other years and some concerns would order a lot less?

A. That is true.

Q. They vary, don't they?

A. They vary. It is according.

Q. Aren't there years when you sell more in New York City?

A. Never. Not in my time.

Q. Aren't there years when you get more orders from Buffalo than other years?

A. No.

Q. They are always exactly the same?

A. Close to it. The bulk of the business of Herman Beispel is out of New York State and New York.

Q. You keep saying that, but I would like you to answer these specific questions. I did not ask you anything about the bulk of the business outside of the State of New York. Why are you so eager to tell us that?

A. Not that I am eager, but I know when I was charging the merchandise, I know where I was charging it to.

Q. But you seem to be very eager to impress the Court of the fact that the bulk of your merchandise went outside of the State. Why are you so eager? What is your interest in it?

[fol. 318] A. No interest at all. I know what I am shipping.

Q. I am asking you some specific questions. I am asking you whether you did not get more business in some years in up-State New York points than other years.

A. I answered you, sir, we did not, and we still don't get it.

Q. They are always exactly the same?

A. That is right; very close to it.

Q. So——

A. May I interrupt. I could explain why. We have four salesmen and they are on the road more often than the average dress house. We have a man on the road now it would sound ridiculous that there ain't another salesman on the road, and yet he is out getting business, and he travels way past Chicago, and then he will go to Oklahoma City and come back.

Q. Now, do some of these contractors make goods that are more in demand in certain parts of the country than others?

A. Yes.

Q. Do some contractors make goods that are more in demand in big cities, and other contractors make goods that are more in demand in other places?

A. It is according to styles.

Q. Exactly. So some years, let us say the things you get from Raizen & Trager may go big in San Francisco and in other years it might be one of your other contractors [fol. 319] whose goods they would want?

A. That is according to the season. At the present time they are doing a lot down in Florida. We get a lot of orders from Florida, Palm Beach, and all that.

Q. Does that mean the goods from certain contractors are in particular demand in Florida now?

A. They would be, yes. Lighter stuff, lighter weight merchandise.

Q. And it might mean that at the present time—and the same, I suppose, would be true in 1939, 1940 and 1941—the goods of one of your contractors might be in demand in a particular locality——

A. It is up to the merchandise. Some goods are made in heavier material, some are made in lighter material.

Q. That is not an answer to my question. I will try to make it clear. In 1939, 1940 and 1941 were there times when the goods made for you by some contractor would be in particular demand in a particular part of the country?

A. There would be in certain parts of the country, yes.

Q. You did not sell uniformly a certain percentage of Raizen & Trager's goods to certain specific parts of the country, did you?

A. No, I would not say that. Now, when they show a line they have various styles from the beginning. Mr. Beispel would make up a line of 40 or 50 garments and then it is up to the buyers. If they like it they will buy it; and then [fol. 320] these various garments are selected and given to the various contractors. Where one contractor would make a one-piece garment, he would make a two-piece garment.

Q. Is there anything peculiar about the dress market in Albany and Rochester as distinguished from Harrisburg and Pittsburgh?

A. Well, they might be able to use a cheaper line of merchandise.

Q. Or more expensive line?

A. Or more expensive. It is according.

Q. Now, in 1939 where did you ship? To what part of the country did you ship the bulk of the Raizen & Trager goods, if you know?

A. Well, that I could not answer, where I shipped the bulk of Raizen & Trager merchandise.

Q. You have nothing to do with placing the order for merchandise, have you?

A. No.

Q. You don't have to worry about that, do you?

A. No; my worry is to get them in and ship on time.

Q. Your worry is when the physical goods come in, pack them up, see that they are not torn——

A. Well, the examiner sees that they are not torn, but my particular job, especially now, I got to go around the factories and pull these out of the baskets and see that they are shipped before they are cancelled.

[fol. 321] Q. And it is your job to see that they are properly packaged, is that right?

A. Yes.

Q. And that the boxes are properly closed?

A. Closed, tied up and marked.

Q. You have got to see that they are addressed to the right places?

A. Yes.

Q. That is a pretty big job, isn't it?

A. Fairly.

Q. You have your hands full?

A. I think so.

Q. And you did in 1939, 1940 and 1941?

A. I had it much easier than today.

Q. And if some of the merchandise from one contractor did not suit your customers as well as from another, or anything like that, that was for somebody else to worry about, wasn't it?

A. That is the selling force.

Q. Exactly. So you really didn't concern yourself with the particular goods that you put in a particular box as far as concerned the contractor. It did not make any difference to you, did it?

A. Well, it would not make any difference to me whose goods they are. As long as they belonged to the customer, they would be charged and packed and sent out to the customer.

Q. And there was no special reason why you should have remembered at that time whether the goods of one of your contractors happened to be more in demand in Nevada or in Montana, was there?

[fol. 322] A. It is according to the style.

Q. I did not ask you what the fact was. I asked you whether it would be of any interest or concern to you as distinguished from other people in your organization?

A. That is not up to me.

Q. It is not up to you?

A. No.

Q. There is no reason why you should have paid any particular attention to it, is there?

A. Well, I could give you—we have one garment for the Spring season that they sold over 1200; just this one particular dress——

Q. Mr. Stegman, what I am getting at is this; It was very much your concern to see that these shipments went out on time and went out properly, is that right?

A. That is right.

Q. And in the course of that it would be natural that you would notice in a general way at least where they went. You would notice, for instance, if you had an unusually large shipment to California, you would notice that, wouldn't you?

A. Certainly.

Q. Certainly you would. But it was not part of your business, was it, to notice what particular dresses were in demand in Los Angeles as distinguished from San Francisco or Portland, Oregon or New York City?

A. No.

Q. And you did not notice it, did you?

A. No—what do you mean I didn't notice it? I noticed [fol. 323] what styles we were selling, if that is what you have reference to.

Q. You noticed which particular garments went into which particular containers?

A. Yes. I charge them, then I should know what went into the one box. There might have been two garments from Raizen & Trager; there might have been a garment from Shalewitz——

Q. It was not your duty, but you say you did notice those things?

A. It is not my duty, but as the merchandise comes in from the various factories, they are collected and assorted to the various customers. We might have three dresses for a customer; two two-piece suits and another suit, and they are put into a box and out it goes; so it would not

make any difference to me who made the merchandise, who made the garment.

Q. It would not make any difference to you about who made the garment, would it?

A. That is not my worry. I am supposed to get the thing out to the customer within a specified date.

Q. And you could not have remembered a week later which garments went to which particular customer?

A. Well, if you mentioned the styles I would.

Q. Could you remember three or four years later?

A. No.

Q. You don't know where Raizen & Trager's goods went in 1939, do you?

A. No.

[fol. 324] Q. You could not tell us a single customer who got a garment from Raizen & Trager?

A. Yes, I could tell you more than one single customer.

Q. Well, how could you tell us?

A. How could I tell that?

Q. Yes.

A. It is very simple. I handled it for two years.

Q. Tell us the name of a customer.

A. Roos Bros. on the Coast——

Q. How do you know they got any of Raizen & Trager's garments?

A. I think I am capable of knowing what I charge.

Q. What garments did they get? Tell us the style that they got in 1939. That is all I am asking you, no other year.

A. I can't pick out a specified garment; I have no sketch with me to show it to you, but I know that I shipped merchandise.

Q. Now, these are the names you have selected, sir, not I. You describe, if you can, please, any garment made by Raizen & Trager that you shipped to Roos Bros. in San Francisco in 1939.

A. I am telling you, he made dresses that we shipped not only to Roos Bros. but other parts of the country. I can't describe the individual dress.

Q. You can't describe it?

A. No.

Q. You can't tell us how many Raizen & Trager dresses [fol. 325] went to Roos Bros. in 1939?

A. No, sir, I could not tell you how many dresses went to any customer in the last three weeks that was made particularly by Raizen & Trager.

Q. Of course you could not. You could not possibly tell us anything of that sort three or four years ago, could you?

A. No, sir; because they are all bunched together, as I explained to you, from the various contractors.

Mr. Falk: That is all.

(Witness excused.)

The Court: We will take a short recess.

(Short recess.)

Louis Schwartz, called as a witness on behalf of the plaintiff, being duly sworn, testified as follows:

Direct examination.

By Mr. Entes:

Mr. Entes: If your Honor please, second page from the last, about the middle of the page. With reference to Nathan Wells.

Q. Mr. Schwartz, are you employed by Nathan Wells?

A. Yes, sir.

Q. Who had the northwest unit on the 19th floor, as you know it the 20th floor, from February 1, 1940 to the present time?

A. Yes.

Q. You are employed by them?

A. Yes.

Q. And what is your position?

A. Cutter.

[fol. 326] Q. You are a cutter for Mr. Wells?

A. Yes.

Q. And are you familiar with the business of Mr. Wells?

A. Yes.

Q. Is he a dress contractor?

A. Yes.

Q. And whom does he contract for?

A. Fred Greenberg.

Q. 550 Seventh Avenue?

A. Yes.

Q. Did you ever have occasion from February 1, 1940 to February 5, 1942, to visit the premises of Mr. Greenberg?
A. Yes.
Q. You did visit the premises of Mr. Greenberg?
A. Yes.
Q. And how often would you say you visited the premises during that time?
A. About five or six times.
Q. Five or six times what? A week, a month, or what?
A. Sometimes weekly; sometimes a month.

By the Court:

Q. I thought you were a cutter.
A. Yes.
Q. What did you do at Greenberg?
A. Sometimes I go to bring a check——
Q. You mean you just do an errand?
A. That is it.

By Mr. Entes:

Q. Did Mr. Wells contract exclusively for Mr. Greenberg?
A. Yes.
Q. During that period?
A. Yes.

Mr. Entes: That will be all.
Mr. Falk: No questions.

(Witness excused.)

[fol. 327] Jack Fisher, called as a witness on behalf of the plaintiff, being duly sworn, testified as follows:

Direct examination.

By Mr. Entes:

Q. Mr. Fisher, are you employed by the C. H. D. Robbins Company of 525 Seventh Avenue, Borough of Manhattan, City of New York, State of New York?
A. I am.
Q. And were you employed during the years of 1939, 1940 and 1941?
A. I was.
Q. How long had you been employed there?

A. 13 years.

Q. And in what position were you employed?

A. I am a salesman.

Q. A salesman?

A. Was and am.

Q. And as such salesman is it your duty to be familiar with the dresses?

A. Yes.

Q. And from the period 1938 to 1942 was Max Yuni of 575 Eighth Avenue a dress contractor for your employer?

A. That is right.

Q. And was Max Schneider of 575 Eighth Avenue also a contractor for your employer?

A. That is right.

Q. During those years?

A. That is right.

Q. And did Max Yuni have particular styles or dresses to make during those years?

A. Yes.

Q. As distinguished from dresses of other contractors?

A. No.

[fol. 328] Q. By that I mean did each customer have a particular style to make for your employer?

A. At the assigned times.

Q. That is what I mean. At the assigned times.

A. That is right.

Q. At the assigned times each contractor had a different style of dress to make, is that so?

A. In some cases one style would be made by two contractors too.

Q. Were you familiar with the dresses of Max Yuni and also the dresses of Max Schneider? Did you recognize such dresses as being made by them?

A. Yes, that is right.

Q. And you recognize those dresses for the years 1938 to 1942, is that so?

A. That is right.

Q. During those years?

A. Yes.

Q. Do you know where these dresses were sold?

A. That is right.

Q. And where were these dresses sold?

Mr. Falk: I object to the question unless——
The Court: Objection sustained.

Q. How did you know?

A. Well, we have card systems arranged in alphabetical order of States, and it gives a fair picture of where we sold our dresses.

Q. And these were accounts outside the State of New York?

A. Oh yes.

Q. And did you sell to those accounts outside the State [fol. 329] of New York?

A. That is right.

Q. And did you have resident buyers visit your office?

A. Yes.

Q. And did you sell dresses of Max Yuni and Max Schneider during the period of 1938 to 1942 to these buyers out of town?

A. That is right.

Q. And did you make out order slips for these accounts outside the State of New York of these particular contracts?

A. That is right.

Q. And were those dresses sold to these accounts that you made the orders for?

A. That is right.

Q. And did you have re-orders from these accounts, in reference to the same orders?

A. That is right.

Q. And did you receive shipping instructions, how to ship these garments?

A. Yes, we did.

Q. Did you ship these garments through different freight systems?

A. There are some that I shipped through different freight systems.

Q. Which were they?

A. There are some people that have their merchandise shipped express and some are shipped to New York offices, to packing houses.

Q. And you received those instructions?

A. Yes, from the customer or their representatives.

Q. What was the most frequent way of shipping?

A. That is very easy for us. We have a system of books [fol. 330] whereby express shipments get odd numbers and

packing houses get even numbers, and to the best of my knowledge most of our goods are shipped by express direct.

Q. And these goods were shipped direct to the accounts outside the State of New York?

A. That is right.

Mr. Falk: May I object to the question unless the words "these goods" are defined?

Q. The dresses of Max Yuni and Max Schneider were shipped as per instructions to accounts outside the State of New York?

A. Yes.

Q. And these accounts were in different States in the United States?

A. We sent out approximately 3500 or 4000 statements a month.

Q. Where did you send them, to different States in the United States?

A. Yes.

Q. And have you had many of these accounts for those years?

A. Yes, we have had some of these accounts for many years.

Mr. Entes: That is all.

Cross-examination.

By Mr. Falk:

Q. Mr. Fisher, how many contractors did your concern deal with in the years 1939, 1940 and 1941?

A. Well, you can't put the three years in the category. There has been a change made in our——

Q. Let us take 1939.

[fol. 331] A. 1939 I think we had approximately about 20 or 21.

Q. 20 or 21 contractors?

A. That is right.

Q. Of which Yuni was one, is that right?

A. Yes.

Q. Yuni and Schneider?

A. Yes.

Q. Are these two concerns or one?

A. Two concerns.

Q. And did you deal with both of them as contractors in 1939?

A. Yes; our firm did.

Q. What volume of your gross contracting business did you give to Yuni and Schneider together?

A. I personally don't give. I am a salesman. You mean my firm?

Q. I mean your firm; if you know.

A. Well, I think I have a fairly good idea. But by percentage I could not possibly give you.

Q. You don't know?

A. No.

Q. You don't know what part of your gross contracting business was done by Yuni or Schneider——

A. I could, if I wanted to really sit down and delve into it, get an idea of the gross production for the year, and see if two of our men would get a lion's share than the two weakest.

Q. I want to simplify this for you: We are just concerned with question and answers at the present time, not what you could do or might do.

A. No, I could not possibly give you any percentage points on what they actually got.

[fol. 332] Q. Can you give me any percentage in 1940?

A. I could not give it to you for any year unless I delivered.

By the Court:

Q. How many contractors did you have in 1940?

A. In 1939—there was a change in 1940, your Honor; so it is 1939——

Q. How many did you have in 1940?

A. Well, there was a change and we reduced it to 16, I think. I am not sure about the figures.

Q. And in 1941?

A. From 1940 to the present date we retained the same amount of contractors.

By Mr. Falk:

Q. Now, when you testified in answer to Mr. Entes' question that you can identify the garments made by Yuni or Schneider, do you mean if a lady walked into a room

wearing a garment, you could tell by looking at it whether it was made by Yuni or whether it was made by one of your other contractors?

A. Well, within a reasonable amount of time I could, yes.

Q. What do you mean by reasonable amount of time?

A. Well, I could not tell some years later, but in the current season—in other words, dresses made in the past Fall, I could remember which contractor made it.

Q. You mean you would recognize the style?

A. Yes.

[fol. 333] Q. But didn't you testify before that you sometimes had more than one contractor make the same number?

A. That is right.

Q. So you would only know within the limits of those few contractors?

A. By the style of that particular garment.

Q. If you had a run on one particular number, if one went very well, you could put your contractors right to work on it, couldn't you, as many as you could?

A. No; we would put two. Not every contractor would be capable of doing a certain amount of work.

Q. You would put two?

A. Yes.

Q. So you might have Yuni and a certain other contractor other than Schneider, is that right?

A. Yes.

Q. And you would not know unless you took particular care to make some inquiry as to whether one of those garments came from Yuni or the other contractor, would you?

A. Not by looking at it, no.

By the Court:

Q. Was Yuni one of your contractors in 1940?

A. Yes.

Q. 1941?

A. Yes, sir.

Q. 1942?

A. Yes, sir.

Q. Schneider also for all those years?

A. Yes.

By Mr. Falk:

Q. Did you have anything to do with the shipping department of your business?

A. On occasions, yes.

[fol. 334] Q. What do you mean by that sir?

A. Well, if we are exceptionally swamped, the salesman sort of pitches in.

Q. Was that true in 1939, 1940 and 1941?

A. That is right.

Q. How often did that happen in 1939, 1940 and 1941?

A. In the season very often. As often as was necessary.

Q. What did you do in connection with it?

A. We used to pick them, pack them and ship them.

Q. Did you close the containers?

A. Yes.

Q. And address them?

A. Yes.

Q. Do you go out of town in the course of your work?

A. On occasions, yes.

Q. Where do you go?

A. I go to Philadelphia, Baltimore and Washington.

Q. What was your volume of business in 1939?

A. Approximately $3,000,000.

Q. In 1940?

A. About maybe—well, in 1940 it might have been two and a half.

Q. 1941?

A. It averages about—from 1941 to 1943 I would say would be an average of about three or three and a half million dollars gross.

Q. So we can take a rough figure of $3,000,000 for 1939, 1940 and 1941?

A. Yes, that is right.

Q. Now, did you ship any goods to any concerns or warehouses in New York City in 1939?

[fol. 335] A. Concerns or warehouses?

Q. Did you have any accounts in New York City in 1939?

A. Local stores, we have some, yes.

Q. When you put your emphasis on "some", what do you mean by that?

A. Well, it is the smallest percentage of our business. In other words, our New York City file where it is indexed is the least amount.

Q. Do you have any business in other cities of New York State?

A. We have some, sure.

Q. You have just about the same amount of business, let us say, in the cities of New York State as you have in the corresponding sized cities of Pennsylvania or Ohio?

A. No; we had more in Pennsylvania than we had in New York, and we have more in Ohio than we have in New York.

Q. Do you have substantial business in Albany?

A. Fair.

Q. Rochester?

A. Yes.

Q. Syracuse?

A. Yes.

Q. Utica?

A. That is right.

Q. Buffalo?

A. Yes.

Q. What other cities in New York do you have?

A. Well, we sell Peekskill and we sell Newburgh and we sell Olean—very little cities, we have a man that covers that territory pretty well.

Q. What percentage of your gross business in 1939 was [fol. 336] to concerns in the State of New York?

A. I could not say.

Q. Can you give us any idea at all?

A. No, I could not give you any idea at all.

Q. Can you tell me whether you ever in 1939 shipped merchandise to points within the State of New York that were sold to concerns outside the State of New York?

A. Yes, we did. We shipped some to packing houses.

Q. A substantial amount?

A. No, not too much.

By the Court:

Q. By "packing houses," you mean an organization which assembles packages for carload purposes?

A. Yes.

Q. And they retransmit it?

A. Yes.

Q. And get the carload rate?

A. Yes.

By Mr. Falk:

Q. Now, besides your shipments to customers in New York State and besides your shipments to packing houses in New York State, did any of your customers located primarily outside of New York State have offices or warehouses in New York State to which you made shipments in 1939?

A. There are resident buyers that include in the fee that they charge their client, they also do some packing for them. They get these packages sent to their offices and they send it to the destination.

Q. Do you know what the percentage of your shipments [fol. 337] in 1939 were to packing houses?

A. I would not know in percentage points as far as what part of gross volume would be in one particular way. I could not say that. We have a pretty large business.

Q. Now, can you state what part of the merchandise you had made at Yuni and Schneider in 1939 was shipped to points within New York State, either to customers, packing houses, buyers' offices or warehouses?

A. (No answer.)

Q. You don't know?

A. No.

Q. It would be impossible for you to testify, wouldn't it, about where any particular merchandise made by any particular contractor was shipped?

A. From memory there could not be. It could not be anywhere near accurate.

Q. Does that apply also to 1940 and 1941?

A. It would apply to any year.

Mr. Falk: That is all.

Redirect examination.

By Mr. Entes:

Q. In 1939, 1940 and 1941, when you had made out the orders for your out of town accounts, did they have dresses of Max Yuni and Schneider therein?

Mr. Falk: I object to it on the ground that the testimony of this witness already has demonstrated that he is without knowledge on the only point as to which his testimony would be relevant and material; and therefore it is [fol. 338] immaterial, irrelevant and incompetent for him

to testify with respect to those matters which might corroborate other testimony if he had been able to give it.

The Court: I will let him answer the question.

Mr. Falk: Exception.

Q. (Read.)

A. Did they? Yes, definitely.

Q. Were those accounts scattered in the different States of the United States?

A. Definitely.

Q. And these accounts were continuous accounts during that time?

Mr. Falk: I object to that question because I don't know what it means.

The Court: The objection to the last question is sustained.

Mr. Entes: That is all.

(Witness excused.)

Irving Hymowitz, called as a witness on behalf of the plaintiff, being duly sworn, testified as follows:

Direct examination.

By Mr. Entes:

Q. Mr. Hymowitz, by whom are you employed?

A. By M. Gollomp & Sons of 501 Seventh Avenue.

Q. Did you bring the subpoena I served on Gollomp & Sons with you?

A. Yes, I think I have it.

[fol. 339] Q. Mr. Hymowitz, what is the nature of your employment there?

A. I am a salesman.

Q. You are a salesman?

A. Yes.

Q. And how long have you been employed?

A. Since 1937.

Q. And were you a salesman during that entire period?

A. Yes.

Q. And as such salesman are you familiar with the accounts of M. Gollomp & Sons?

A. Yes, to a certain extent. Not all.

Q. Did you know that Benjamin Weinstein was a dress contractor for M. Gollomp & Sons during the years 1938 to 1942?

A. Yes.

Q. Did Benjamin Weinstein have a particular style of dress to make for M. Gollomp & Sons?

A. Yes, at particular times he had particular styles.

Q. And those styles were distinguishable from that of other contractors at that particular time?

A. All we had was one other contractor, and they never made the same styles. One made a particular style.

Q. You had one other contractor?

A. That is all.

Q. And the styles were distinguishable at any given time?

A. Yes.

Q. At any given time during 1938 to 1942 you could recognize the dresses of Benjamin Weinstein from another contractor?

A. Yes, at that particular season.

[fol. 340] Q. Do you know where the dresses of Benjamin Weinstein, made for your employer, were sold?

A. Yes. We do most of our business out of New York City. That is, very little in New York State; mostly out of New York State, because we have——

By the Court:

Q. Did you ever sell any of Weinstein's dresses outside of the State of New York?

A. No. I sold in New York City to resident buying offices who sell his merchandise.

Q. Did you sell it for the account of any customer outside the State of New York? Did you personally?

A. Yes, I.

Q. Weinstein's garments?

A. Yes.

By Mr. Entes:

Q. And you sold these dresses during 1939, 1940 and 1941?

A. Yes.

Q. And these accounts of the resident buyers were located in various States of the Union?

A. Yes.

Q. Most of these dresses were shipped and packed pursuant to the order sent from the various States in the United States?

A. Yes.

Mr. Falk: I object to the question.

The Court: Let me hear the question.

Q. (Read)

[fol. 341] The Court: Objection sustained.

Q. Do you know whether these dresses were shipped and packed pursuant to these orders?

A. Do I know?

Q. Do you fill these orders?

A. I do not fill the orders, no, sir.

Q. Do you know whether the orders were filled?

A. Well, they must have been. They left orders and they naturally were shipped; the dresses were shipped.

Mr. Falk: May I ask that the witness be instructed as to what we mean by "know" in a court of law?

The Court: Frame your question more appropriately.

Q. Did you observe what was done with the dresses?

A. Yes, sir.

Q. Did you help in the selection of these dresses in making the order out?

A. Not often.

Q. Did you help sometimes?

A. Once in a while. Not very often.

Q. You did see the dresses of Benjamin Weinstein being packed, though?

A. Naturally, yes.

Q. And did you receive confirmation of orders from Benjamin Weinstein from accounts outside the State of New York?

A. Sometimes. Most of the time they gave you an order as they looked at the merchandise in the showroom.

Q. And these accounts were in different States of the [fol. 342] United States, is that so?

A. Yes, practically every State of the Union.

Mr. Entes: That will be all.

Cross-examination:

By Mr. Falk:

Q. Your concern is a substantial one in the industry, isn't it?

A. I don't know what you mean. We have been in business for 43 years.

Q. How much space have you got?

A. I could not tell by feet. I would imagine—offhand I would say it is about 80 or 90 feet long by about 40 or 50 feet wide, or something like that.

Q. Is it a whole floor?

A. No.

Q. Did you have that same space since 1939, 1940 and 1941?

A. Yes; we have been there since 1931.

Q. Are you an officer of the corporation?

A. No.

Q. Are you a director?

A. No.

Q. A stockholder?

A. No.

Q. Who is the head or are the heads of the business?

A. M. Gollomp & Sons consists of Louis and Paul Gollomp.

Q. Are these two gentlemen active in the running of the business?

A. Yes, that is all they do.

Q. Were they in 1939, 1940 and 1941?

A. Yes.

Q. Are there any other executives there besides yourself and these gentlemen?

A. Not that I know of. I do not think so. I am quite sure there are not.

[fol. 343] Q. You would know, wouldn't you?

A. Yes. There are nobody but Louis and Paul Gollomp who are members of the concern.

Q. How do you divide up the work?

A. What do you mean?

Q. Well, the functioning of it.

A. My particular duty is to sell merchandise. I go out in the morning and call on my customers and take care of my customers that come into the showroom in the afternoon.

Q. I believe you said you go out of town on occasion?
A. No.
Q. You don't go out of town?
A. No.

The Court: This witness sells inside the city.
The Witness: Yes.

Q. That consumes most of your time?
A. Yes, to a great extent you sit around and wait for customers to come in, and whatever there is to do in the place.
Q. Do you have a shipping department?
A. Yes.
Q. A shipping clerk?
A. Yes.
Q. And in 1939, 1940 and 1941 did you maintain that shipping department as a separate part of your business?
A. It has always been a separate part. A separate part of the loft is the shipping department; divided into a separate part.

Q. That is not the part where you conduct your sales work?
A. Well, it is hard to explain—no. Our sales work of course is in the showroom, and part of our place—you can [fol. 344] always see what is going on in our place. It is not so large that you have to run all over looking for what goes on. If you keep your eyes open you can see just what goes on in the place.
Q. Is the shipping department at one end?
A. No——

The Court: If is usually the darkest space, isn't it?
The Witness: No, it is not the darkest space. It is a nice space. If you want to know the details, the elevator is here (indicating), and then into the showroom, and there is a door that leads into the stock room, and the shipping room is just a little bit off to the left.

Q. During 1939, 1940 and 1941 you had only two contractors, is that right?
A. That is right.
Q. Did they make about an equal amount of goods?
A. I could not give you any figures. I had nothing to do with the amount of work each contractor made, so I

would not know. I would not know what percentage each one made.

Q. That was not part of your work?

A. Well, when we work in a place you try to make yourself useful all around, but I could not tell you any figures what each one made.

Q. And the shipping was not primarily your job either, was it?

A. No, it was not my job, but it was my job to find out [fol. 345] if my customers got their shipments. I would inquire about that.

Q. In 1939 did you have any customers—by "you" I mean your company, not you individually—in the City of New York?

A. Very little. We do very little business in the City of New York, as I explained. We have most of our men travel, and I sell most to New York resident buying offices who represent out of town concerns, so I would say a very small percentage is New York City.

Q. What was your gross volume of business in 1939?

A. I could not answer. If you want me to guess——

Q. No, we do not want a guess. Approximately.

A. I don't know. I would rather not answer that.

Q. Does that apply to 1940?

A. As I said before, if you want a guess——

Q. No. Your lack of knowledge is the same for these three years?

A. I could not give you a figure of our volume of business.

Q. Can you give it to us in number of garments?

A. Well, it is the same——

Q. You don't really know?

A. As I said, if you want a rough guess——

Q. Just try to answer my questions, Mr. Witness. I am asking you now, so that we sum this all up, whether you know the volume of business either in dollars and cents [fol. 346] or in number of garments in 1939, 1940 and 1941?

A. I don't know the volume of business.

Q. Do you know the volume of business that was done with New York City customers in any of those years?

A. No, volume I would not know; but as I said before, a very small proportion.

Q. Do you know whether in 1939, 1940 and 1941 your company sold any merchandise to concerns in New York State outside of New York City?

A. Whether our company sold any merchandise——
Q. To people in New York State.
A. Yes.
Q. You have an up-State business?
A. We have business everywhere.
Q. Including New York State?
A. Including New York State.
Q. New York State is a pretty fertile territory, isn't it, for merchandise of that kind?
A. Yes.
Q. There are some big cities up-State, aren't there?
A. Yes.
Q. Isn't New York State considered good territory?
A. Anywhere is good territory where people will buy merchandise.
Q. Well, New York State is one of the places where people buy that kind of merchandise, isn't it?
A. They buy dresses. I do not know what you are trying [fol. 347] to get at. We sell dresses anywhere, anyone who will buy. If you come from China we will sell you merchandise.
Q. Did you sell any to China in 1939?
A. No.
Q. Are you trying to be funny?
A. No.
Q. You answered the questions. Did you sell any merchandise in New York State in 1939, 1940 and 1941?
A. Yes.
Q. A substantial amount?
A. I do not know the amount.
Q. Did you ship the merchandise for the customers in New York State to their places of business in New York State?
A. No—we have most of our merchandise shipped by express unless it is specified by an order to a packing company. They accumulate packages from individuals and they send it in bulk——
Q. I think you did not really listen to my last question. It was a very simple question and called for a very simple answer. I asked you whether you shipped merchandise that you sold to customers in New York State to their places of business in New York State.
A. By express——
Q. I did not ask you how you shipped it. I asked you

whether you shipped it to them. If you sold something to someone in Buffalo in 1940, did you send it to Buffalo or to China?

A. We sent it to Buffalo.

Q. That is all I asked you. And did you do the same [fol. 348] thing with all of your other customers up-State?

A. Yes.

Q. So that whatever you sold to customers in New York State you shipped to New York State, is that right?

A. Yes.

Q. Regardless of the method that was used?

A. Yes, sir.

Q. Now, in addition to those shipments made in New York State, did you make any shipments to points in New York City or elsewhere in New York State for customers whose places of business were located outside of the State?

A. As I said, we shipped to packing houses and sometimes some people who represented the buying offices in turn accepted packages for them and they in turn would send it to them.

Q. So the answer to that last question could have been yes; you did ship to points in New York State for customers outside, didn't you?

A. Well, if you mean it that way—I try to answer you intelligently and truthfully. I am not trying to get fresh. You raise your voice at me—I am trying to answer your questions to the best of my ability.

Q. I will try to make them very simple. Did you ship any merchandise that you had sold to customers whose places of business were located outside of New York State to points inside of New York State?

[fol. 349] A. As I understand it——

The Court: The answer to that is "Yes." Now let us get along.

Q. Were some of those shipments made to packing houses?

A. Yes.

Q. Was a substantial amount of merchandise shipped by you to packing houses in 1939, 1940 and 1941?

A. The bulk of our business was shipped by express. Not very much by packing houses.

Q. Some was?

A. Some was, yes.

Q. Do you know what percentage of your shipments?

A. If I would guess——

Q. No, don't guess. I asked you if you know?

A. No, I don't know any figures.

Q. Did you ship to any local offices of out of town customers? In other words, did you sell to, say, a Chicago mail-order house?

A. We don't sell mail order. We don't ship any merchandise in bulk. The only way we might ship it is where there is an office where they represent them and they in turn ship the package along to them.

Q. But you can't tell us what percentage in any of those years of your shipments were made within New York State, can you?

A. No, I could not tell you.

Q. And you certainly can't tell us whether any part [fol. 350] of the merchandise of any particular contractor was shipped to any particular points, can you, after this lapse of time?

The Witness: Will you ask that question again, please?

Q. Can you tell us where any specific merchandise from either of these two contractors was shipped in 1939?

A. Right now?

Q. Yes.

A. I can't tell you right now.

Q. You can't?

A. No.

Q. You don't know offhand after all these years?

A. I would not know, no, where merchandise was shipped in 1939.

Q. You did not consult any of your records before you came here?

A. I did not know I was coming here until twenty minutes ago, or about 10:30.

Q. And you similarly could not give any such testimony with respect to 1940 or 1941 either, could you?

A. You mean where each contractor's dresses went to?

Q. That is right.

A. I could not tell you what part of the country it was shipped to, no.

Mr. Falk: That is all.

[fol. 351] Redirect examination.

By Mr. Entes:

Q. But you could testify that the dresses of Benjamin Weinstein were shipped to different States of the Union?

A. Positively.

Q. And almost each State of the Union, is that so?

A. Practically every State of the Union.

Q. And for the entire period in question, the three years?

A. Yes.

Q. And they were shipped continuously?

A. Yes.

Mr. Entes: That is all.

Recross-examination.

By Mr. Falk:

Q. If you are so positive about that, will you explain how you know, as distinguished from your general surmise. You are testifying about a course of business, aren't you?

A. You asked me if I could tell you whether Weinstein's dresses were shipped to one particular place. I can't tell you that, but I can say that his *ad*dresses were shipped everywhere in the United States or practically everywhere.

Q. Were they shipped to the State of Nevada in 1939?

A. You asked me a question—I said practically every State. They might have been shipped to Nevada, yes. We shipped merchandise to Nevada.

Q. Was any shipped to Nevada in 1939?

A. I could not say yes in Nevada, but I could say yes in [fol. 352] Ohio, or I could say yes in Illinois, because we have more customers——

Q. Which State do you want to take? Let us take Ohio. Will you tell me to what customer you shipped what particular dresses of this contractor in 1939?

A. I could not tell you that.

Q. You don't really know, do you?

A. I don't know what particular style was shipped to what particular customer, but I do know that in 1939 we shipped Weinstein's dresses to the State of Ohio. I could say that.

Q. How could you say that? What do you base it on?

A. Well, we did a fairly large business and we sold merchandise throughout the United States, and Weinstein I would say makes 50 to 60 per cent of our dresses. Now, his dresses do go to practically every State of the Union, wherever we have our orders to be shipped to.

Q. You are talking about a course of business, aren't you, as distinguished from a specific recollection? If you had to pay a tax, for example, on the number of Weinstein's dresses that you shipped to a particular place in Ohio, you would not be so sure without looking at your records, would you?

A. Well, I mentioned Ohio because that is a State where we sell more merchandise than the State of Nevada.

Q. Well, let us take Ohio. Give me the name of one of [fol. 353] your customers in Cleveland.

A. The Bailey Company in Cleveland.

Q. Did you sell any of Weinstein's dresses to Bailey in 1939?

A. I imagine so.

Q. I did not ask you for your imagination. Do you know whether you did or not?

A. I could not say.

Q. You could not say?

A. No.

Q. Tell me the name of one of your other customers in Cleveland.

A. Well——

Q. Do you remember the names of your customers in Cleveland?

A. They are not my particular customer.

Q. Oh, I thought you——

The Court: He sells in New York.

The Witness: You see, he gets me rattled——

The Court: Take it easy.

Q. You did not even have occasion to interest yourself in the shipments made to Ohio or the other Western States, did you?

A. No; the only occasion I would know is people go into the showroom and I know who is who and where they come from.

Q. Do you remember even in the case of New York State, your own territory, which particular dresses would go to which customer in 1939?

A. I have no territory in New York City. I do not sell to New York City. I sell to resident buying offices in the City [fol. 354] of New York who represent merchants all over the United States.

Q. So Bailey & Company have a resident agent in New York?

A. Yes.

Q. And you sold to them?

A. I did not sell to them. But you asked me for the name of an account, and I gave you the name of an account.

The Court: Let me ask you a question: Every contractor who has been here says he sells outside the City of New York. Who keeps warm and clothes the people who live in New York City?

The Witness: Truthfully speaking, the firms I know sell outside of New York City. I do not know why it is. And New York City buys an awful lot of merchandise from out of town manufacturers.

The Court: All right. You are excused.

(Witness excused.)

[fol. 355] Sydelle Cohen, called as a witness on behalf of plaintiff, being first duly sworn, testified as follows:

Direct examination.

By Mr. Entes:

Q. Miss Cohen, where are you employed?

A. Sheila Lynn, 1400 Broadway.

Q. Have you a subpoena with you?

A. Yes, I have.

Q. May I have it, please?

A. Yes.

Q. What position do you hold?

A. I am in the cutting department and I am also order clerk.

Q. And how long have you been employed there?

A. Six years.

Q. Are you familiar with the general nature of your employer's business? Do you know what business your employer is in?

A. Yes.

Q. What?
A. Dress business.

By the Court:

Q. Is he a contractor or manufacturer?
A. A manufacturer.
Q. That means he manufactures no clothes?
A. That is right.

By Mr. Entes:

Q. During 1938 to 1942 was Schrader & Bazarnick contractors for Sheila Lynn Company?
A. Well, I just know Mr. Schrader.
[fol. 356] Q. Mr. Schrader.
A. He was.
Q. At the particular times did you have any other contractors?
A. Yes; we did.
Q. How many?
A. We had at that time 14.
Q. And were these contractors at one particular time given different styles to make, each contractor?
A. Yes, each contractor had their own styles to make.
Q. And you could recognize at a particular time the dress of one particular contractor because of the style of that dress, is that so?
A. Yes.
Q. And did you see the dresses or recognize the dresses of Schrader during 1939, 1940 and 1941? Did you see them in your place of business?
A. Yes.
Q. You recognized those dresses to be the dresses of Schrader, is that so?
A. Yes.
Q. By the particular style at the particular time?
A. Yes.
Q. Were you familiar with some of the accounts of Sheila Lynn, your employer?
A. Certainly.
Q. Were you familiar with some of the shipments of dresses of Schrader to these different accounts?
A. Well, at that time we gave Schrader the material and he used to do cutting, and the dresses were shipped then——

Q. And they came back finished dresses?
A. Yes, and we reshipped them out.
[fol. 357] Q. Do you know where these accounts were located which Schrader dresses were shipped to?

Mr. Falk: That question calls for a yes or no answer.
Mr. Entes: Let her answer.
The Court: Do you understand the question?
The Witness: Yes.
The Court: Do you know what customers Schrader's garments manufactured for you were sent?

Q. Not the name. Where they were located generally.
A. No, I would not know.
Q. By that I mean——

Mr. Falk: She has answered that she does not know.
The Court: He may put another question. Go ahead.

Q. By that we mean, do you know where they were shipped, localities? I am not asking for particular names.
A. Well, they are shipped all over——

The Court: Don't tell us where they were shipped. Tell us whether you do know or don't know.
The Witness: Yes, I do.
The Court: How do you know?

Q. How do you know?
A. Well, I am order clerk, so I know.
[fol. 358] Q. Do you see the orders of the accounts?
A. Yes.
Q. And you know where they are located?
A. Yes, I know exactly where they go to.
Q. Where are these accounts located?
A. All over the country. We even send out of the country.
Q. What do you send out of the country?
A. Merchandise, to Hawaii, Alaska, all over.
Q. You ship to every state in the Union?
A. Yes.
Q. Do you know whether or not the Schrader dresses were shipped to accounts outside the State of New York?
A. Certainly.
Q. In making out the orders did you select part of the dresses of Schrader to fill these orders?
A. That is right.

Q. And these dresses selected to fill the orders that were from Schrader were put in packages and shipped to accounts outside the State of New York?

A. That is right.

Q. And these accounts or these orders of Schrader dresses were shipped also to foreign countries and United States possessions, is that so?

A. Yes.

Q. And were these accounts continuous accounts and steady accounts between the years 1939, 1940 and 1941?

Mr. Falk: I object to that question on the ground that it is irrelevant and immaterial. We are concerned with the specific garments, not whether the accounts were con-
[fol. 359] tinuous.

The Court: The objection is well taken.

Mr. Entes: All right; I will reframe the question.

Q. Were the dresses, Schrader dresses, shipped to accounts, and were the Schrader shipments continued—I mean, did you ship Schrader dresses to accounts all over the United States?

A. Yes.

Q. Was that continuously from 1939, 1940 and 1941?

A. Yes.

Q. And in two months of 1942. We are concerned with October 24, 1938, to February 5, 1942.

A. Yes.

Mr. Entes: That is all.

Cross-examination.

By Mr. Falk:

Q. What was the gross business, gross sales of your concern in 1939?

A. The figures I don't know, because I have nothing whatsoever to do with them.

Q. Do you know for 1940?

A. No, I don't know figures.

Q. 1941?

A. I don't know any sales figures at all.

Q. Do you know any shipping figures?

A. No, that is not my department.

Q. Shipping is not your department at all, is it?

A. No; I just enter orders.

Q. You have nothing to do with the shipping, have you?

A. No.

[fol. 360] Q. As far as you know of your own direct knowledge and observation, when the orders are put through and terminated, you don't know what happens to the physical garments, do you, of your own knowledge?

A. Well, I mean—I know that they are packed up and they are shipped out to different accounts.

Q. How do you know they are shipped out except by the way we all know things we read in the newspapers?

A. No.

Q. How do you know?

A. My department deals hand in hand with the shipping.

Q. I am talking about you individually. What did you know in 1939?

Mr. Entes: If your Honor please, I just want to make this remark——

The Court: Remarks are not in order. Objections are the only things in order.

Mr. Entes: All right.

The Court: You do not know whether, when the elevator boy takes the package down, maybe he burns them in the furnace?

The Witness: I don't know.

Q. You don't know if the shipping clerk puts the right address on of your own knowledge, do you?

A. No.

Q. You just assume, as we all would in your position, [fol. 361] that he puts on the proper address?

A. Yes.

Q. But you don't know it, do you?

A. Well, I do and I don't.

Q. Well, if he makes a mistake do you know that he makes a mistake?

A. No; but it is checked before the package goes out.

Q. By you?

A. No.

Q. But you would not know anything about it, would you?

A. No, I would not.

Q. And you would not be held responsible for a package if it was addressed to the wrong place, would you?

A. No, because I don't do the shipping.

Q. Of course you don't; and you don't have anything to do with the merchandise once it is packed up, do you?

A. No, I don't.

Q. Now, how many contractors did your concern have in 1939, 1940 and 1941?

A. Well, we had 14. Right now we have 8.

Q. In those three years you had 14?

A. That is right.

Q. Schrader was one of the 14?

A. Yes.

Q. And what percentage of the business that you gave to contractors in 1939, 1940 and 1941 did you give to Schrader, if you know?

A. That I would not know.

Q. You haven't any idea?

A. No.

Q. Did you have any accounts in New York State in 1939, [fol. 362] 1940 and 1941?

A. Yes, we had some accounts. Resident buyers do the buying for those accounts.

Q. Do you sell some concerns that have stores in New York City?

A. Yes. Most of our business is done out of town.

Q. But you have some in town, haven't you?

A. Yes.

Q. By "in town" I mean New York City?

A. Yes.

Q. Do you have any accounts in larger cities of New York State?

A. Yes.

Q. You know what the chief cities of New York State are.

A. Yes.

Q. Do you have any accounts in any of those cities?

A. We have.

Q. You testified to a widespread business. Isn't it just as widespread in those cities of upper New York State as it is in other parts of the country?

A. Yes.

Q. What percentage of your business was business with concerns located in New York State in 1939, 1940 and 1941, if you know?

A. They are all over.

Q. You don't know what the percentage was in New York State, do you?

A. No.

Q. You haven't any idea?

A. No.

Q. In other words, there are 48 states, and you think you sold to all the states, is that right?

A. That is right.

Q. And you have 14 contractors, and you don't know [fol. 363] how much of the goods came from Schrader?

A. No.

Q. Do you ship to any out-of-town or out-of-State concerns to points in New York? Do you understand what I mean? Are any of your customers outside of New York State in the habit of giving you shipping instructions to points in New York State?

A. Certainly.

Q. So that besides the shipments you make to your New York State customers, you make some shipments to points in New York State for other customers?

A. That is right.

Q. Do you know what the percentage of those shipments is?

A. No, I don't know that either.

Mr. Falk: That is all.

(Witness excused.)

Mack Waldman, called as a witness on behalf of plaintiff, being first duly sworn, testified as follows:

Direct examination.

By Mr. Entes:

Q. Mr. Waldman, you are employed by Paul Schiff who had the front part of the second floor for how long?

A. Four years; 1939.

Mr. Entes: Your honor, I wish to call your attention to page 1. I think they have the date there as June 1, 1940.

Mr. Wise, is that correct?

Mr. Wise: I came into the building in January and [fol. 364] he was there at that time.

Q. Mr. Waldman, Mr. Schiff has been there four years in the premises and they occupy the front space on the second floor?

A. That is right.

Q. What is your position there?

A. Bookkeeper and general manager.

Q. Are you familiar with the nature and character of your employer's business?

A. That is right.

Q. Will you please tell the Court what is the nature and character of your business?

A. We handle woolens, piecegoods, which we sell to ladies coat and suit manufacturers.

Q. And where are these manufacturers located?

A. Out of town.

Q. Out of town?

A. Out of New York City.

Q. Are they located outside the State of New York, too?

A. That is right; Chicago, Kansas City and Los Angeles.

Q. Are they located all over the United States?

A. Yes.

Q. Are they located outside the United States, during that period, 1939, 1940 and 1941?

A. We never export.

Q. Do you sell to any foreign possessions?

A. No.

Q. How did you receive those goods in your place? How are they wrapped?

A. In packages.

Q. Where are they shipped from?

[fol. 365] A. The majority of the goods I would say would come from the New England section.

Q. From mills?

A. Direct from mills, woolen mills.

Q. With reference to those goods, do you take these goods and fill orders for them?

A. That is right.

Q. Do you break open the packages that you receive from these mills?

A. That is right.

Q. And you unpack the piece-goods?

A. Yes, and then re-pack them.

Q. In filling orders for piece-goods do you measure goods for different customers, the yardages and so forth?

A. Yes; cuts.

Q. And you put slips on it, sizes and so forth?

A. Shipping slips.

Q. And you cut the garments; you cut it for measurement?

A. That is right, for certain desired measurements.

Q. And then you fill out an order according to the sizes and measurements and qualities and quantities of goods?

A. That is right.

Q. Have you a shipping department?

A. That is right.

Q. And then the merchandise is re-wrapped in your own wrappers, papers or packages?

A. Yes.

Q. And is this merchandise then shipped by express?

A. Well, we do very little express.

Q. How do you ship it?

[fol. 366] The Court: That is a pretty expensive way to ship woolens, isn't it?

The Witness: Yes. Very little express.

Q. Which way do you ship?

A. Mostly it is two or three firms, either Acme Fast Freight——

The Court: That is a trucking concern, isn't it?

The Witness: No, it is freight; railroad.

The Court: Railroad freight?

The Witness: Yes. And Western Carloading.

Q. Is that railroad freight?

A. Yes.

The Court: These are repackaging companies, you are speaking about; is that what Acme Fast Freight is? Is that a repackaging concern?

The Witness: No; they take on anything, one piece or a carload or two pieces; it does not make any difference.

Q. And they ship them out of town, is that so?

A. Yes.

Q. To whoever the accounts are?

A. To the destination, that is right?

Q. And these accounts have been continuous accounts during the years 1939, 1940 and 1941 especially?

A. More or less.

By the Court:

Q. You don't sell to New York people?

A. Yes, we do.

[fol. 367] Q. You started out by telling me that you did your business out of town.

A. I said most of our business.

The Court: I see.

By Mr. Entes:

Q. Do you see the shipping clerk wrap these packages?

A. Yes, I do.

Q. And do you see that these packages go on to the freight to be shipped or delivered?

A. They are picked up by a truckman who takes it directly to the freight company.

Q. You see the packages going from your place to the truckman?

A. I do.

Q. And you see where they are marked for?

A. Addressed to, yes.

Q. And do you see the original orders that come from the account?

A. I handle that.

Q. These accounts are from all states of the Union, is that so?

A. I would not say all.

Q. Most of the states?

A. Well, they are limited.

Q. Tell us which states they are limited to.

A. I should say outstanding cities of Chicago, St. Louis, Kansas City, Portland, Seattle, Minneapolis.

Q. There are six or seven different states outside the State of New York?

A. Yes.

Q. And they get the bulk of your business?

A. Yes.

Q. The biggest part of your business?

A. Yes.

[fol. 368] Q. And during those years was that so?

A. Yes.

Mr. Entes: That is all.

Cross-examination.

By Mr. Falk:

Q. Were you with this concern in 1939, 1940 and 1941, in the same capacity?

A. That is right.

Q. Did you process any of those goods in your place?

Mr. Entes: If your Honor please, I object to the use of the word "process." Process may be a very highly technical term. He is a layman——

The Court: Do you know what he means by the word "process"?

The Witness: Yes. I presume he means manufacturing.

Q. Did you do anything to these woolens when you got them between the time they reached your place and the time they left, except open the packages and measure them and cut off a piece and repack?

A. Nothing.

Q. The woolen left your place in the same condition it came in, didn't it?

A. Well, very often, outside of the cutting.

Mr. Entes: Your Honor, I object to that question, because the witness has testified they are measured to different sizes.

The Court: He said so. The question pre-supposed that. He said, "Did you do anything else except measure them and repack them, open up the package, measure it, cut [fol. 369] it off and repack it?"

Q. Did you sell them under trade names of your own?

A. No, sir.

Q. Did you put any labels on them?

A. By labels. I presume you mean tickets. That is what we would call it.

Q. Would you put anything on it?

A. Yes; tickets.

By the Court:

Q. What does the ticket say?

A. The style, the color of the piece, number and amount of yards.

Q. You put your own ticket on?
A. Yes.

By Mr. Falk:

Q. How many people worked in your premises in 1939, 1940 and 1941?

A. I should say nine or possibly ten.

Q. What were their duties, just approximately?

A. Well, there are three girls, stenographers and typists, a telephone clerk; there is an office boy—well, it varies, three or four or sometimes five shipping clerks, and I would call him a salesman, although he is not actually, and Mr. Paul Schiff.

Q. And yourself?

A. Yes.

Q. Who did the measuring and cutting of the goods?

A. The boys in the shipping department, and occasionally I would sort of help.

Q. Did you sometimes ship the woolens out in exactly the same form it came in?

A. Many times.

[fol. 370] Q. Is it a fact that you did that most of the times?

A. Well——

Q. Yes or no.

A. Yes.

Q. Isn't it a fact that all your big orders were filled by just taking the woolens that came in and shipping them out to your customers?

A. That is right.

Q. And it was only where some small lot was ordered, a piece here or a piece there, or a re-order, that you cut a piece off and shipped it?

A. Well, no, that goes according to seasons. The early part of the season, for example, like now, we are making a great deal of cuts to manufacturers who desire cuts for sample purposes. In other words, they are not sure whether the cloth will be good or not, and they desire three, five, ten, fifteen yard cuts for their samples, sample coats or suits.

Q. You say a great many cuts. Let me ask you this: measured by dollars, of your invoices how much of the goods which went out in 1939, 1940 and 1941 were goods cut in your place? One per cent?

A. No; more than that.

Q. Five per cent?

A. I should say close to 10 or 15 per cent.

Q. So that the other 85 or 90 per cent of the merchandise went right out as it came in, is that correct?

A. Right.

Q. And the people in your organization were engaged [fol. 371] in receiving the merchandise, getting orders and selling it and shipping?

A. Correct.

By the Court:

Q. Did you always ship from stock?

A. Yes.

Q. You never shipped from——

A. Pardon me. I say Yes. I mean yes and no. We also take future orders. If a customer from out of town comes in we will take an order from him——

Q. You mean you always took the merchandise into your plant first?

A. Yes.

By Mr. Falk:

Q. Did you have any customers in New York City?

A. Yes, sir.

Q. How many?

A. You mean in amounts?

Q. Any way you want to give it to me.

A. Oh, I should say we have about 40 or 50. But it is very hard to say because we can get a new customer any day.

Q. Isn't Rochester a large manufacturing center?

A. Men's wear, not ladies'.

Q. It is not for ladies?

A. No.

Q. Did you ship any to Rochester?

A. Yes; very recently we shipped to Bond Clothes in Rochester.

Q. Aren't your woolens ever sold to manufacturers of men's garments?

A. Very little.

Q. During the years 1939, 1940 and 1941?

[fol. 372] A. To manufacturers of men's clothing?

Q. Yes.

A. Very little.

Q. Did you ship any to Rochester in those years?

A. Not that I would remember.

Q. Did you ship any to any other points in New York State except New York City?

A. Well, possibly one or two. Buffalo and Syracuse are about the only ones who would manufacture ladies' coats and suits.

Q. As far as you remember, how many customers did you have in New York State outside of New York City in 1939, 1940 and 1941?

A. Very small. I should say no more than two or three at the most.

Q. So you had about 50 customers in New York State at that time?

A. Well, including the City, approximately.

Q. And a good deal of the shipments that you made for customers outside of New York State you have testified you made to shipping concerns in New York City, is that right; the Acme Freight——

A. That is right, direct to these firms.

Q. In New York City?

A. Yes.

Q. Now, where is Acme located? In New York City?

A. Yes; pier 17, downtown.

The Court: It is a transportation company?

The Witness: That is right. Same as Erie Railroad or [fol. 373] New York Central.

Q. Now, all of these transportation companies to which you made shipments were located in New York City, were they not?

A. That is right, the receiving part, receiving station.

Q. Isn't it a much cheaper way to ship through a transportation company if you have a shipment going to the Pacific Coast than if you shipped direct by either express or freight?

A. I don't follow that question.

Q. Which is the cheaper way? If you have a big shipment to Portland, Oregon, is it cheaper to send it by Acme or some other concern of that kind, or by turning it over directly to some common carrier like a trucking concern or party that goes to Portland?

A. That can be answered in two ways. First of all, the customer would specify the way he wants it, and then, again, it would be cheaper by freight companies.

Q. That is all I asked you. It is cheaper, isn't it?

A. Yes.

Q. And that is the reason they are sent that way?

A. Correct.

Q. That is the way most of the goods were shipped in 1939, 1940 and 1941, is that correct?

A. Correct.

Q. So a great part of your shipments were shipped to points within New York State by you either to the cus-
[fol. 374] tomer or for reshipment, is that correct?

A. That is correct.

Mr. Falk: That is all.

Re-direct examination.

By Mr. Entes:

Q. The method of shipment was to a carrier and not to a warehouse?

A. No.

Q. It was one direct passage?

A. That is right, from our truckman directly.

Q. It went from your place by some common carrier, some system of carriage to the eventual recipient of those merchandise, didn't it?

The Court: It did not go from his place by a common carrier.

You used your own truckman?

The Witness: No; a hired truckman.

Q. It went from some truckman in New York City to a common carrier and then to the point of ultimate destination?

A. That is right.

Q. Now, when you got merchandise, didn't you always examine the merchandise to see if it was good quality or defective?

A. Yes; many times we would look at the merchandise.

Q. Didn't you look at the merchandise all the time to see if it was defective?

A. No, we did not.

Q. You examined them most of the time?

A. Many times we do. When we open a package——

[fol. 375] Q. When you open a package and examine it and you see certain defects in it, do you reject it and send it back to the mill?

A. We send it to an examiner who sponges it and he marks it off for return and then it goes back to the mill.

Q. The mill gets it and you inform the mill by some communication, by telephone or letter or telegram, that that particular goods are defective, and you state what the condition of the defect is, is that so?

A. That is right.

Q. And that has been continuously throughout the years?

A. That is part of the business.

Q. And sometimes you get merchandise which you ship to customers and customers complain it is defective?

A. That is right.

Q. And they send it back to you?

A. That is right.

Q. And you examine it for the defect?

A. That is right.

Q. You examine their claim for the defect?

A. Yes.

Q. And if you find this defect you notify the mill of the defect and you send it back to the mill?

A. Yes.

Q. And frequently the mill returns to you other merchandise if it is defective merchandise, is that so?

A. They replace it.

Q. And the shipments to your customers mostly are [fol. 376] done in your own packages, is that so?

A. We rewrap them, yes.

Q. And they are not in the same quantities or sizes as that which comes from the mill?

A. No, never.

By the Court:

Q. You never ship a whole piece in the form of piece goods in which it came?

A. Yes. I probably misunderstood.

Q. You get them in wooden cases?

A. No; we get them in wrappers, wrapped in wrapping paper.

Q. And if you get three pieces you get three separate pieces?

A. Yes. I thought he meant, for example, if we get in 20 pieces from the mill, do we get the entire shipments out.

Q. No. But you take a whole piece and send it out?

A. Yes; and we may send it to 20 different people.

By Mr. Entes:

Q. And you take the wrappings off from individual pieces and you put three pieces together and send it to somebody in Chicago, whatever the order calls for?

A. Yes.

Q. That is the way you fill out an order?

A. Yes.

Mr. Entes: That is all.

Recross-examination.

By Mr. Falk:

Q. Do you always take that wrapper off?

A. I should say 90 per cent of the time, because they are torn and damaged.

Q. You just put another one right over it?

A. That is right.

[fol. 377] Q. You do not unwind all the yards of wool, do you, in each case?

A. No. When we take the wrapper off we usually look at it. Many times we test it before going out, it should not be tender.

Q. When you say "test it" you mean you test just a little piece from the end?

A. Yes.

Q. How many yards come in that piece?

A. A good average would be 60, 65.

Q. If you were to unwind all of those pieces that came into your place you would need a great many more employees than you testified you had, wouldn't you?

A. Yes.

Q. And you would need an entirely different layout in the way of premises, wouldn't you?

A. Yes.

Q. So what you do, if you want to look at all at the merchandise is to look at the corner or the beginning—I don't know the technical work——

A. I would not say corner; it comes in double rolls. We can look at a yard or two and test it. The most important thing is that it should not be tender. That is, weak.

Q. That is the extent of the test you make?

A. And—both; for quality and color.

Q. But that is the extent of the test; you don't try to test every yard all the way through to see inside?

[fol. 378] A. Definitely no.

Mr. Falk: That is all.

Redirect examination.

By Mr. Entes:

Q. Isn't it the custom of the trade in examining piece-goods, if you know, to examine just a sample piece, the piece that you testified to?

A. For the customer himself? Yes.

Q. I mean, isn't it a custom in the trade to examine a piece of the goods, or the entire roll?

A. Just a yard or two.

The Court: I think he has had enough.

Mr. Entes: All right. I just wanted to know that.

(Witness excused.)

Bertha Rabinowitz, called as a witness on behalf of plaintiff, being first duly sworn, testified as follows:

Direct examination.

By Mr. Entes:

Q. Miss Rabinowitz, what business does Nathan Shapiro do?

A. That is the Best Pleating Company.

Q. He has been on the northerly half of the 4th floor from February 1, 1939, to the present time, is that so?

A. Right.

Q. And are you familiar with the nature and character of the business of the Best Pleating Company?

A. Yes.

[fol. 379] Q. Will you please tell the Court as best as you can what that business consists of?

A. We do pleating and stitching for the dress trade. We get the parts of the dresses and we make whatever is required. We get the tops or the waists of a dress or a skirt, and we make a pleating or stitching or embroidery.

Q. For the dress trade?

A. Yes.

Q. By that you mean for dress contractors or dress manufacturers?

A. Well, we get it from the dress manufacturer.

Q. The manufacturer or jobber, is that so?

A. Yes.

Q. Who is the biggest manufacturer?

A. Well, wait a minute—we get it from the——

Q. Maybe I can help you a little.

A. No, wait a minute. Let me see. We get it from the manufacturer.

The Court: The people who do not manufacture.

The Witness: That is right.

Q. And who is your biggest account, the name?

A. Well, we have a lot of big accounts.

Q. Who are some of the biggest accounts?

A. We have—do you want the names?

Q. Yes.

A. Kenwood Modes.

Q. Where are they located?

A. Jersey City, 126 Webster Avenue.

Q. Who is another manufacturer?

A. Mayflower Dress.

[fol. 380] Q. Where are they located?

A. 621 Webster Avenue.

Q. Where is that?

A. Newark.

Q. Newark, New Jersey?

A. Yes.

Q. Where are some of the other manufacturers located?

A. We have Rosedale Dress.

Q. Where are they located?

A. Westfield, Mass.

Q. And where are your other contractors?

A. Well, we have Surrey Classics.

Q. Where are they located?
A. 498 Seventh Avenue.
Q. New York City?
A. Yes.
Q. Do you have any others? I am only talking of the big accounts.
A. University Garments.
Q. Where are they located?
A. Yonkers, New York.
Q. Now, I think you have mentioned five manufacturers, if I am correct.
A. Five.
Q. Would you say that was the bulk of the Shapiro business from 1939 to the present time?
A. Yes, I would say that.
Q. By the "bulk" I mean most of the business?
A. Yes.
Q. And out of those which would you say is the biggest account during these years?
A. They all about average the same.
Q. Would you say they are about equal among the five?

The Court: What do you do in Mr. Shapiro's office?
The Witness: I am the bookkeeper.

[fol. 381] Q. You said they are about the same?
A. Yes.
Q. And you are familiar with these accounts?
A. Yes.
Q. And you are familiar with the accounts for the entire period?
A. Yes.
Q. Do you keep a ledger on these accounts through the year?
A. Yes.
Q. Do your ledger books show 1939, 1940, 1941, 1942, 1943, as long as you have the account, is that so?
A. Yes.
Q. What does your employer do for these dress manufacturers?

The Court: We have got all that. He pleats, stitches and embroiders.

A. Different items. One firm requires pleating, one firm requires embroidery on a garment.

Q. And how do you send your garments to the out-of-town factories, one say in Newark, New Jersey—and I think you had one in Westfield.

A. In Westfield, we send it by American Express.

Q. And do you have the American Express book, you yourself?

A. Yes.

Q. Have you got the American Express books for the previous years in your file?

A. Yes.

Q. You keep those books?

A. Yes.

Q. The one in Newark, I suppose you send it American [fol. 382] Express?

A. No; we send it by truckman.

Q. By truckman in New York?

A. Yes. We deliver it to the truckman and he delivers it.

Q. He delivers it by truck there?

A. Yes.

Q. And you have trucking receipts for the merchandise?

A. Yes.

Q. For the merchandise received there?

A. Yes, and the style number and the packages.

Q. How do you deliver to New York? In New York I suppose you deliver by hand truck?

A. Hand truck.

Q. And as bookkeeper you check all these accounts, is that so?

A. Yes.

Mr. Entes: That is all.

Cross-examination.

By Mr. Falk:

Q. Miss Rabinowitz, do you have most of your business over in Jersey?

A. We have some in New York and some in Jersey. I would not say most. About the same.

Q. Would it be more convenient for you to be located over in Newark? Would you be nearer most of your customers?

A. We get it by transportation——

Q. No. I say, would it be convenient——

Mr. Entes: If your Honor please, I object to that question. She is an ordinary employee. She does not know what her boss's convenience is——

The Court: Objection overruled.

[fol. 383] A. What is that?

Q. Would it be more convenient for your concern to be located at some place in New York City than in New Jersey?

A. The office is here in New York; the office of this Jersey concern is here in New York, and we get samples from them.

Q. You have New York customers besides the ones you mentioned?

A. We have some New York customers.

Q. Will you explain to the Court how it happens that in naming four, I believe you named, or five, you happened to pick all but one outside the City of New York?

A. Because he said it was enough, five accounts.

Q. But how did you happen just to pick ones that are not located in New York?

A. Because they are our biggest customers.

Q. They are?

A. Yes.

Q. Biggest in what sense?

A. I mean, we do quite a bit of business with them.

Q. But don't you do quite a bit with New York concerns?

A. He said five accounts were enough, and he did not give me a chance to mention any other accounts.

Q. You are the bookkeeper. What was your gross business in 1939?

A. I was not there in 1939.

Q. Were you there in 1940?

A. No.

Q. Were you there in 1941?

A. No.

[fol. 384] Q. You did not come there until 1942?

A. Yes.

Q. When in 1942 did you come?

A. The early part of 1942.

Q. When?

A. February.

Q. What time in February?

A. What?

Q. What date in February?

A. No, it was the early part of March.

Q. So you did not work there at any time before March 1942, is that right?

A. No.

Q. And the testimony that you have given relates to the period you have been working there?

A. Yes.

Mr. Falk: That is all.

Redirect examination.

By Mr. Entes:

Q. Miss Rabinowitz, when you went to work in March of 1942, you took charge of these books, the account books of the Best Pleating Company?

A. Yes.

Q. And you took charge of the American Express books?

A. Yes.

Q. And you took charge of the truck receipts?

A. Yes.

Q. And through your knowledge or through your observation of these receipts——

By the Court:

Q. Did you re-examine all the old receipt books to see where the goods went to?

A. From when?

[fol. 385] Q. When you came to work in March, 1942, did you say, "Give me the old receipt books; I want to look through them"?

A. I didn't have any reason to do that.

By Mr. Entes:

Q. Did you have any reason to examine the books for the year 1941 in any of these accounts?

A. Unless we have to refer to their accounts.

Q. I mean, did you have occasion to refer to their account—in an order in March, did you have an occasion to refer to an account, say, in June or December of 1941?

A. You mean preceding?

Q. Yes.

A. I don't remember.

The Court: You did not do that?

The Witness: No.

Q. When you went into the place, did you see the amounts of business that you did with these different accounts for the preceding years when you had to make up your—

Mr. Falk: I object to the question on the ground that it is incompetent, irrelevant and immaterial.

The Court: I will sustain the objection on the ground that it is too leading.

Q. You are in charge of the accounts receivable book?

A. Yes.

Q. And in making your entries for these different ac- [fol. 386] counts, these five specific accounts, did you have occasion to see the amount of business these accounts had given for the preceding year or preceding few months?

A. I mean; every year we changed our ledger sheets. That would be on a different ledger sheet.

Q. Would you have occasion for the month of January of that year, January of 1942, in checking your books or February, 1942?

A. Well, I would see the amount of sales.

Q. You would see the amount of sales for these five different accounts——

Mr. Falk: I object on the ground that it is leading.

The Court: Let him finish his question. You are not going to get very far with a witness who just does not know. Assuming it is admissible, how much weight can I give to the testimony of a witness who was not there all the time? All she can testify to is what she knows during the time she was bookkeeper, isn't that so?

Mr. Entes: May I say this to you: The books are books kept in the regular course——

The Court: I have no doubt that the books are admissible, but she is not the books, and she is giving testimony from memory, and the memory is founded on a transac- [fol. 387] tion which she has handled; isn't that so?

The Witness: Yes.

The Court: From what you did. But you did not make an examination of the earlier books?

The Witness: I did not have no course to.

The Court: Of course not.

Mr. Entes: If your Honor please, sometimes when a bookeeper comes into a new place, she might find——

The Court: Sometimes she does, but this girl says that she did not.

Mr. Entes: Sometimes the books are not up to date. The previous bookkeeper may be two months behind, and in correcting her books she may correct them two or three months behind.

The Court: That is possible.

Mr. Entes: If that situation applied, that she did correct such books——

The Court: Did you? Did you have to do some back work when you came in?

The Witness: I would say for about two or three weeks.

The Court: She says two or three weeks.

Mr. Entes: I have never seen this witness before.

The Court: I understand that. Those things do happen. You are excused.

(Witness excused.)

[fol. 388] The Court: Recess until 2:15.

(Recess to 2:15 p. m.)

Afternoon Session

(The following proceedings were had in chambers.)

The Court: Plaintiff's counsel declares that his witnesses are ill or claim to be ill and that he is not able to conclude his case today. He will require one more day for the presentation of the plaintiff's case. In view of the fact that this is the second such deferment of the trial of this case, I direct plaintiff's counsel to be prepared to close his case by the close of court on Monday.

Mr. Entes: That is satisfactory. Plaintiff's counsel says that such ruling is highly satisfactory.

The Court: Very well. I think that is fair.

Mr. Entes: I think that is more than fair.

(Discussion off the record.)

(Adjourned to Monday, December 20, 1943, at 10:30 o'clock a. m.)

[fol. 389] SALVATORE GANGI, etc.

vs.

D. A. SCHULTE, INC.

New York, December 20, 1943;
10:30 o'clock a.m.

Trial resumed.

Mr. Entes: If your Honor please, plaintiffs are prepared to rest subject to the call of three or four witnesses who promised to appear before 11:30. I saw these people this morning and they promised to be here. If they don't show up by 11:30, we will rest.

The Court: I do not know that that is a reasonable suggestion to make under the circumstances. The defendant is not obliged to go forward until the plaintiff's case is in. He should be put in a position to make his motion if he is so disposed to make it.

Mr. Entes: Well, if your Honor please, rather than take the time of the Court, plaintiff will rest at this time subject to your Honor's disposition as to whether these witnesses should appear.

The Court: I do not understand the qualification on your suggestion.

Mr. Entes: The only qualification is this; I made it my duty to see these people this morning. They said they would be here at 10:30. It is 10:30 now and there is no [fol. 390] one here. I do not want to take the position that I am constantly asking for adjournments that are not warranted. I am ready to rest at this point. The only thing is, these witnesses definitely promised to be here, and I don't think it would be fair to the plaintiffs not to permit them to testify if they are a few minutes late.

The Court: Of course, I am not going to interfere with the defendant. If he is willing to consent to such an arrangement I won't stand in the way.

Mr. Falk: If your Honor please, I view this entirely as a matter between Mr. Entes and the Court. We can't deviate from regular procedure. In other words, whenever he rests we are prepared to make our motions and go on with our case. Now, if what he is trying to do is ask the Court for an extension of time, a half hour or something for that sort, that is something between him and

your Honor which, naturally, I won't even express any opinion about. Whatever the Court thinks on that question is entirely agreeable to us, and that is about all I can say. But if he is tacking any other qualification on to his resting, I know that the Court won't accept it.

Mr. Entes: No; there is no other qualification.

The Court: Well, I am sure that counsel for the plaintiff will agree with me that every possible consideration [fol. 391] has been extended to the plaintiffs——

Mr. Entes: We concede that, your Honor.

The Court: —in the presentation of their case, and I have applied no pressure upon choice of witnesses or calling witnesses or the orderly presentation of their case. I do not feel free to insist, nor do I think I could insist that the defendant should proceed until the plaintiff has fully rested. Reservation of right to call witnesses I think are matters which can only be upon, except in unusual circumstances, consent of the parties. At the same time I realize that this is probably the only time you are going to try this case.

Do you think that your witnesses may be here inside of a quarter of an hour?

Mr. Entes: Well, your Honor, to show the good faith of the plaintiffs, if none of my witnesses appear by 10:45 plaintiffs are ready to rest.

The Court: Very well. The Court will take a recess until 10:45.

(Recess to 10:45 a.m.)

Mr. Entes: The plaintiffs now rest.

The Court: The plaintiffs rest. Mr. Falk?

Mr. Falk: Have the plaintiffs rested?

The Court: The plaintiffs have rested.

[fol. 392] MOTION TO DISMISS COMPLAINT

Mr. Falk: If your Honor please, the defendant moves to dismiss the complaint on the ground that the plaintiffs have failed to establish a prima facie case. There is no testimony upon which, I respectfully submit, the Court could make a finding that the occupants of this building during the period October 24, 1938 and February 2, 1942, were engaged in production of goods for interstate commerce

within the meaning of the Act here in question to a degree within the term "substantial," however liberally that term "substantial" might be construed.

The bulk of the tenants, from the testimony that has been given, appear to have been engaged in the contracting business, which has been described to your Honor as taking goods which were sent by so-called manufacturers (of whom your Honor has aptly said they do everything except manufacture) and doing work on those goods, and returning them practically a hundred per cent to manufacturers. The testimony has shown that these so-called manufacturers were located in the City of New York, and the goods that left these premises, accordingly, with very few exceptions, were returned to points within the City of New York. I do not think it is necessary to expatiate upon the testimony. We have analyzed the testimony of the various witnesses. We worked over the weekend, and the notes [fol. 393] that we made are being typed at the office. I have asked that the original notes be sent up immediately because in case your Honor might possibly want to know the results of our tabulation, or be in doubt about the testimony of any witness—and I know that the Court made full notes during the testimony—and if the Court's interpretation of the testimony was the same as mine I would surmise that your notes contain a series of zeros. It seemed to me that each witness whose testimony had to be elicited the same way as if the testimony concerned a tenant of the premises for the entire period, either ended up by admitting that he did not know what the relevant facts were, or admitting that the tenant in question was not engaged substantially in producing goods for interstate commerce. Therefore, it seems to me, sir, that no matter how liberal an interpretation the Court might make of the testimony that has been adduced, who liberally the Court might see fit to construe the word "substantial," this record is barren of any evidence upon which a court could hold that the plaintiffs here have brought themselves within the coverage of the Act.

The Court: Decision will be reserved.

Mr. Entes: May I just state for the record, your Honor, there were certain concessions made——

The Court: I remember them very well.

[fol. 394] Mr. Entes: Your Honor, I have a witness here, but due to the fact——

The Court: I do not think it is even fair of you to suggest that fact in the record.

Mr. Eates: All right.

Mr. Falk: If your Honor please, I further move to dismiss the complaint in this action upon the ground that the answer sets up as one of the affirmative defenses the fact that the plaintiffs here released the claim as a result of a compromise entered into with the defendant, and that the witness, Mr. Gangi, the first witness who was called by the plaintiffs and one of the plaintiffs himself who testified in his own behalf, gave testimony which affirmatively established the fact that this was a settlement and a compromise, and that the plaintiffs did sign written releases, and that therefore even if the Court possibly could find that there was coverage here under the Act, the Court would be obliged, I respectfully submit, to find that the claims had been duly and properly settled and compromised and released.

The Court: Well, that raises to my mind the most difficult question involved in this action, and that is the validity of such a release. I have not formed any judgment on that matter yet because I was waiting either for the development of further proof, if there was going to be [fol. 395] any, and in the absence of any further proof, the examination of some more law that I have had an opportunity to do in the course of the trial. There is evidence here that a paper was signed, certainly, which purported to release these claims, and I have in mind the testimony of the witness Gangi as to the circumstances under which that was given. If you want to leave it at this point, why, of course, I will pass on that question as a matter of law and on the evidence so far adduced.

Mr. Falk: Well, we intend, sir, to call, if your Honor does not dismiss the complaint now at this point, our witnesses. And I might say that I did not really regard the making of the motions at this time with any less seriousness than with the confidence that your Honor would grant them at this point. Ordinarily, the testimony given at a lengthy trial, the Court naturally wants to have an opportunity to review it and hear it all; and as we went along step by step there was no testimony to support the coverage, and I felt that therefore the Court might feel at the end of the plaintiffs' case that it was not even necessary to take the testimony of the defense——

The Court: I have had no opportunity and no means whereby I could add up the significance of the concession and to add thereto such of the other situations as I might [fol. 396] find involved coverage, because I have not had them thrown against the background of the whole. I have not had a table—I could make one up out of the records I have——

Mr. Falk: We are making one up now.

The Court: But I have not yet made up a table which would indicate to what extent the crossword puzzle has been filled in and to what extent it has been left blank, and for that reason I am in no position at this moment to make a finding on the basis of all the evidence.

Mr. Falk: Your Honor, the court reporter has been most helpful and cooperative here in getting out for us a transcript of the minutes, and he was good enough to let us have some Saturday and the rest on Sunday. I might say for the record, this is Monday morning. And we—and by "we" I do not want to claim the credit;—it is all Mr. Friedman's work, my associate in this trial—Mr. Friedman worked all weekend on this and he summarized this testimony; and, as I said before, he turned over the longhand notes to a stenographer this morning, and now because of the fact that the plaintiffs are resting we have sent for the original notes. We expect to submit to your Honor the sort of summary that you have indicated would be helpful showing the space occupied by the various witnesses or the space occupied by the contractors to which [fol. 397] the manufacturers referred, and the period of time during the period in question that these respective tenants occupied the space so that some computation could be made.

I still say, and I am really trying not to be controversial about this, but I have not felt, as any witness left the stand, that he had made any score whatsoever, and that the only portion of the building that might be said for the purpose of this suit to be scorable under the head of production for interstate commerce, was this concession at the outset. But that computation will be here and will be submitted to the Court.

Now, I take it from what your Honor said, to avoid another delay, you prefer to have us proceed with our case.

The Court: I think so.

Mr. Falk: Shall I call my witness?

The Court: You may call your witness.

Mr. Entes: Your Honor, I just want to say for the record that the concessions they made with reference to footage, space and vacancies were put in the record, and were concessions of both sides for the benefit of the plaintiffs, the defendant and the Court. Now, I assume the tabulation they will have will be fully accurate and——

[fol. 398] The Court: You will have fully opportunity to check it.

Mr. Entes: I was in their office Saturday and they told me they would have it this morning, but I have not seen it yet.

The Court: You have the same access to the testimony, and you have been here, and you heard the testimony.

Mr. Entes: To make myself clear, we are not interested or we are not asking to see their notes with reference to the testimony. I am only concerning myself with the footage of the units, the actual footage. Now, it may be that under actual footage there may have been an error in some places, and I would like to check that.

The Court: Of course, you will have ample opportunity.

Mr. Falk: We have no objection whatsoever to letting Mr. Entes see all our notes. There is nothing secret about this thing.

The Court: There is not going to be anything confidential here in the communication between the defendant and the Court.

Mr. Entes: I merely made the statement for the record [fol. 399] to indicate that they conceded they would submit such papers to the plaintiffs on the footage.

Mr. Falk: We will submit anything to you that we have.

The Court: What I want to do is take this building as if it were a child's building made up of building blocks, and say that the red blocks represent production of goods for commerce and the yellow blocks do not represent production of goods for commerce. And then, when we have filled up the whole building, see how many red blocks we have, and get an impression, is this building substantially red or is not substantially red? If it is, then under the decisions of the Supreme Court, definitely it falls in this production of goods for commerce class. If the amount of red chromosomes in this whole building do not seem to say that the employees are engaged in a substantial amount of

production of goods for commerce, then I take it the law is that this building is not so engaged and that these employees are not so engaged. Now, in order to be able to say that I have got to have dimensions on these building blocks and say to what extent a case has been made out. As long as any part of this is missing I can't really visualize the whole structure.

All right.

[fol. 400] Mr. Falk: Mr. Entes, I show you a batch of papers and ask if you will concede that these are papers that were signed by the plaintiffs whose names appear on them in longhand and were delivered to the defendant on the respective dates that appear on them?

Mr. Entes: Yes.

The Court: It is conceded that these are the papers signed by the plaintiffs?

Mr. Entes: Yes.

The Court: And those for whom the plaintiffs sue in a representative capacity.

Mr. Entes: We will also concede that Ryan witnessed those signatures.

Mr. Falk: Well, he did not witness all of them, as a matter of fact.

I offer these in evidence. Mr. Friedman tells me that there may be a few in this batch that are not plaintiffs in this action; so if it is agreeable to the Court suppose we check them at the next recess and offer them at that time.

The Court: Very well. They may be deemed marked Exhibit B at this time.

(Deemed marked Defendant's Exhibit B.)

[fol. 401] Harry J. Ryan, called as a witness on behalf of the defendant, being duly sworn, testified as follows:

Direct examination.

By Mr. Falk:

Q. Where do you reside, Mr. Ryan?
A. 765 Riverside Drive.
Q. New York City?
A. That is right.

Q. What is your business?
A. Real estate.
Q. How long have you been in the real estate business?
A. About 23 years.
Q. What is your position at the present time?
A. District agent.
Q. For what concern?
A. D. A. Schulte, Inc.
Q. How long have you been connected with D. A. Schulte, Inc.?
A. 18 years.
Q. Is D. A. Schulte, Inc. the defendant in this action?
A. Yes.
Q. Do you know the building at 575 Eighth Avenue, New York City?
A. I do.
Q. How long have you known that building?
A. About two years.

The Court: Two years from today?
The Witness: Yes.

Q. Mr. Ryan, do you recall any discussion with any of the employees of that building in the Summer of 1942?
A. I do.
Q. With respect to a claim that was made by any of [fol. 402] those employees for certain moneys alleged to be due them under the Act that is the subject of this suit?
A. Yes——

Mr. Entes: If Your Honor please, I object to that question. The witness can testify with reference to what the conversation was. He is leading him to certain phases of the conversation. He asked him with reference to claims.
Mr. Falk: I was just trying to save time.
The Court: The objection is sustained. The answer is yes. He recalls the conversation.

Q. Was there more than one conversation?
A. Yes, several.
Q. With which employees did these conversations take place?
A. Two. Mr. William Johnson and Mr. Gangi.
Q. Is Mr. Gangi the gentleman seated at the counsel table with Mr. Entes at the present time?

A. That is right.

Q. He was the first witness in this trial?

A. Yes.

Q. You were here at the time he testified?

A. I was.

Q. Did Mr. Johnson and Mr. Gangi occupy any special position, if you knew, among the employees of the building?

A. Yes.

Q. What was that?

A. Shop steward.

Q. Which was shop steward?

A. Both were at different times.

Q. Which one was first?

A. William Johnson.

[fol. 403] Q. When did you have your conversation with Mr. Johnson, Mr. Ryan?

Mr. Entes: If your Honor please, I object to that question. Mr. Johnson is not a plaintiff in this action—is Mr. Johnson a plaintiff (conferring with Mr. Gange)—I withdraw the objection.

A. Latter part of June 1942.

Q. Where did the conversation take place?

A. In the lobby.

Q. Of the building?

A. That is right.

Q. Was anybody else present?

A. No.

Q. Will you state what the conversation was, what he said and what you said? Not the exact words, but the substance of it.

A. The gist of it was that Mr. Johnson advised me that he and the other employees had noticed the decision in the Arsenal case and they felt they were entitled to overtime and penalties as called for.

Q. What did you say, if anything?

A. Well, it was rather a surprise to me——

Q. Well, you can't testify how you felt, whether you were surprised or not. What did you say, if anything?

A. I told him I felt the building did not come under the Act.

Q. Did you amplify that at that time in any way?

A. Yes.

Q. What did you say?

A. I told him that the majority of the tenants of the [fol. 404] building were contractors who furnished labor rather than making any material for interstate commerce.

Q. Did he say anything further?

A. Yes. He said that he and the other employees still felt they were entitled to it, and he wished I would take it up with the office.

Q. Do you recall if there — any part of that conversation which you have not covered in your testimony?

A. Not that first conversation. That was the gist of it.

Q. Was anything said about where shipments were made that left the building?

Mr. Entes: If your Honor please, I——

The Court: That is leading.

Q. You have testified to the entire conversation as far as you remember it, Mr. Ryan?

A. As far as I remember, yes.

Q. Is that the only conversation you had with Mr. Johnson on that subject?

A. No.

Q. When did you have another one?

A. About a week or ten days later.

The Court: Still in June?

The Witness: Possibly, your Honor, it might have been the first week in July.

Q. Where did that take place?

[fol. 405] A. It was either in the office of the building or in the lobby.

Q. But it was in the building?

A. Yes.

Q. Will you state the substance of that conversation?

A. I told Mr. Johnson that the office felt that the building did not come under the Wage and Hour Act and they were not going to make any payments.

Q. What did Mr. Johnson say, if anything?

A. He said he would take it up with the other men in the building and advise me further.

Q. Did you hear from him again about it?

A. No.

Q. Did you communicate with him again?

A. No.

Q. Did you have any further conversation with him on that subject?

A. Not that I recall.

Q. You have testified that you had a conversation with Mr. Gangi.

A. That is right.

Q. Do you recall when that took place?

A. That was in August.

Q. Did you have more than one conversation with Mr. Gangi on this subject?

A. Several.

The Court: The first one in August?

The Witness: Yes.

Q. Will you state where that took place?

A. I think the first conversation with Mr. Gangi was in the lobby of the building also.

Q. Did he initiate it or did you?

[fol. 406] A. He asked if he could talk to me for a moment, and I said certainly.

Q. And what did he say and what did you say?

A. He reiterated Mr. Johnson's demands that the employees be paid for their overtime and penalties as called for in the Wage and Hour decision, and I told him the same as I told Mr. Johnson, that we did not feel that the building came within the Act.

Q. Did you feel when you spoke to Mr. Gangi that Mr. Johnson had been succeeded by Mr. Gangi as the spokesman for the men?

A. I did.

Q. Were you informed of that before that conversation, or did Mr. Gangi tell you that?

A. No, the superintendent told me.

Q. Who is the superintendent?

A. William Gunther.

Q. After that first conversation with Mr. Gangi when did you have another one, if you did?

A. A few days later,

Q. Where did that take place?

A. I believe in the office of the agent of the building.

Q. Did you send for him or did he come to see you?

A. He came to see me.

Q. What did he say?

A. Unless we made the payments as requested they would be forced to go to litigation.

Q. What did you say?

A. I said I would take it up with the office.

Q. What did you mean by the office?

[fol. 407] A. The main office of the company.

Q. Of the Schulte Company?

A. That is right.

Q. Did you speak to Mr. Gangi again on the subject?

A. I did.

Q. When?

A. About ten days or two weeks after the last conversation I have referred to.

Q. Was this still in August 1942?

A. Either the latter part of August or the very early part of September.

Q. When did this conversation take place, the one you are now testifying to?

A. The latter part of August or the first part of September.

Q. Where did it take place?

A. Where?

Q. Yes.

A. In the office.

Q. Of the building?

A. Yes, the office of the agent.

Q. Now, we want to be perfectly clear because you are using the word "office" in a couple of senses. It is natural enough to talk of office sometimes as the office of the building; but you do not mean that when you say you had to take it up with the office? There are two different offices, aren't there?

A. Yes, there are.

Q. There is the office located in the building?

A. That is correct.

Q. Whose office is that primarily?

A. Mr. Wise, the renting agent.

[fol. 408] Q. And the other office of the Schulte Company is not located in the building, is it?

A. No.

Q. Did Mr. Gangi in this last conversation seek you, or did you send for him?

Mr. Entes: If your Honor please, I think that is a leading question, and I move to strike it out.

The Court: No. I will overrule the objection. Go ahead.

A. I sent for him.

Q. Did he come to the office?

A. He did.

Q. What did you say to him when he came, and what did he say to you?

A. I told Mr. Gangi that I had submitted his request to the main office and they had decided that rather than go to litigation, even though they still did not feel that the building came under the Wage and Hour Act, they were willing to pay straight overtime to the employees who were entitled to it.

Q. What did Mr. Gangi say to that?

A. He said he would take it up with his men and let me know.

Q. Was anything further said at that conversation?

A. Not in that conversation.

Q. Did you speak to Mr. Gangi again on that subject?

A. Yes, I believe the next day.

Q. Where did that conversation take place?

A. In the building at 575. I do not recall where.

[fol. 409] Q. In the office?

A. Possibly, or in the entrance lobby.

Q. What was the substance of that conversation?

A. That he and the other employees would accept the straight time.

Q. Was anybody present at that last conversation?

A. Not that I recall.

Q. Was anybody present at the conversation before the last one, the one in which you told Mr. Gangi up in the office of the building what the position of your main office was?

A. Yes, Mr. Wise, I recall, the agent, was in the office at that time.

Mr. Entes: If your Honor please, I now think it is proper to move to strike out what he told Mr. Wise the main office told him.

The Court: I did not catch that.

Mr. Falk: Mr. Entes is, I think, if I may say so, confusing the hearsay rule. This testimony is being offered

to show not what the main office said but what Mr. Ryan said to Mr. Gangi.

The Court: Of course. I thought I had missed something in the last question.

Q. Did you have any further conversation with Mr. Gangi?

A. Yes.

Q. When did that next one take place?

[fol. 410] A. On the day that we turned the checks over to the several employees.

Q. Do you remember what date that was?

A. Yes.

Q. What date was it?

A. September 24, 1942.

Q. Where did you have that conversation?

A. In the renting office of the building.

Q. Was anybody present beside you and Mr. Gangi?

A. Yes.

Q. Who?

A. Mr. William Gunther, the superintendent, and Mr. Wise, the renting agent.

Q. Will you state the substance of that conversation and what if anything transpired at that time in Mr. Gangi's presence?

A. Mr. Gangi was sent for and came into the office. I told him that we had a check to submit to him and a release to sign——

Q. I show you this paper, which is deemed marked Defendant's Exhibit B, and I ask you if that is the paper which you just referred to as the release which you had prepared for Mr. Gangi to sign?

A. That is it.

Q. Will you please continue? I just interrupted you to identify the paper.

A. Mr. Gangi read the release and said before he could sign it he would have to take it up with someone. He left the office and came back in about ten minutes and said it was acceptable to sign it, and we gave him his check, and he left the office.

Q. Was the check that you gave Mr. Gangi a check for [fol. 411] the amount mentioned in the release, $266.36?

A. No. I will have to clarify that.

Q. Will you do so?

A. It was that amount less the Social Security deductions as called for by law.

Q. Subject to that deduction was it the correct amount?

A. It was.

Q. Did Mr. Gangi sign this in your presence?

A. He did.

Q. There is a longhand signature under "Witness." I ask you if you know whose signature that is?

A. That is mine.

Q. Did you sign it at that time?

A. I did.

Q. Did Mr. Gangi take the check?

A. He did.

Q. Was it subsequently cashed?

A. It was.

Q. And payment was made on it?

A. Yes.

Q. Has Mr. Gangi ever offered to refund the proceeds of that check or any part of it?

A. No.

Q. Now, when you saw Mr. Gangi that day, September 24, 1942,—and according to your testimony you saw him twice—he came in and then went out for ten minutes and then came back; then was anything said beyond what you have testified to?

A. Yes. I testified what Mr. Gangi said. I said, as I handed him and all the other members their checks, that we were making this payment as a settlement but still did not admit that the building came under the Wage and Hour Act.

[fol. 412] Q. When you say that you said this to Mr. Gangi and the other men, do you mean that they were all in the room together and you handed the checks out?

A. No; they all came in individually.

Q. Is it your testimony that this is what you said to Mr. Gangi when you gave him his check and he gave you the release?

A. That is right.

Q. Did he say anything further?

A. Not that I recall. "Thank you"; that is about all.

Q. Mr. Wise was there?

A. Yes.

Q. And Mr. Gunther?

A. Yes.

Q. Now, on that day did you see any of the other plaintiffs?

A. Yes.

Q. Will you state the circumstances under which you saw them?

A. After Mr. Gangi left I sent for each one in turn and showed them the release and they read it and signed it and received their checks; and as I handed them the checks I told them the same as I told Mr. Gangi.

Q. Are the other papers constituting Exhibit B the releases that you refer to?

A. Yes.

Q. That were signed and delivered to you by the respective plaintiffs?

A. Not all of them. Not all of them were signed at that time.

Q. Were there some employees that were not available at that particular time?

A. That is correct.

[fol. 413] Q. Either because of their hours of work or some other reason?

A. Yes.

Q. But the ones that were available, the releases that bear the date September 24, 1942, and your signature as witness, were the releases that were given to you at that time?

A. That is right.

Q. And did you give each man who signed and delivered such a release a check in the amount mentioned in the release, less the deduction as testified to in Mr. Gangi's case?

A. That is right.

Q. Now, have any of the plaintiffs, whether of those men whom you saw at that time or otherwise, offered to the defendant to return the proceeds of those checks or any part of them?

A. No.

Mr. Entes: Your Honor, I move to strike out the question and answer. He is pleading a release. I do not think the question of refund is at all material.

The Court: All right. Motion denied.

Mr. Falk: That is all, sir.

The Court: You may cross-examine.

Cross-examination.

By Mr. Entes:

Q. Mr. Ryan, I notice on the exhibit, Defendant's Exhibit B, which consists of a series of releases, that some of them are witnessed by Mr. Wise and some are witnessed by Mr. Schulman. Who is Mr. Schulman?

[fol. 414] A. It is Miss Schulman.

Q. Who is Miss Schulman?

A. She is my secretary.

Q. Now, those that are witnessed by Mr. Wise and Miss Schulman were not witnessed in your presence, were they?

A. That is correct.

Q. And you don't know what conversation took place at that particular time of your own knowledge, is that so?

A. That is right.

Q. Now, Mr. Ryan, it is my recollection that you testified that you first received a visit from William Johnson around June of 1942, is that correct?

A. That is correct.

Q. And that was in the lobby of the building?

A. That is what I recall, yes.

Q. And do you recall what part of June 1942 it was, if you recall?

A. I would say the latter part.

Q. The latter part of June?

A. Yes.

Q. Will you tell us, Mr. Ryan, what that conversation was, again?

A. Mr. Johnson said that he and the other employees had become aware of the decision in the Arsenal case and felt that they were entitled to the overtime and penalties as called for in the Act.

Q. And what was your reply to that?

A. I did not feel the building came under the purview of such an Act.

Q. Now, Mr. Ryan, you testified you have been a real [fol. 415] estate man for 23 years.

A. I think approximately, yes.

Q. As such real estate man do you confine yourself solely to real estate activities?

A. Yes.

Q. You are not an attorney, are you?

A. I am not.

Q. And you are not particularly versed in real estate laws, are you, as an attorney?

A. Not particularly versed.

Q. I mean you could not give any legal advice with reference to any particular real estate law, could you?

A. No.

Q. So if you were to give such advice you would give it on advice of counsel, is that so?

A. If I gave such advice.

Q. With reference to the Wage and Hour Act, you had no occasion to particularly study that Act at that particular time, did you?

A. Only reading it in the newspaper, that is all.

Q. Were you familiar with the Wage and Hour Act, or did you know the name of the Wage and Hour Act, the statute name?

A. No.

Q. Would you say it was called the Fair Labor Standards Act of 1938?

A. Possibly. I do not know yet the real name.

Q. So therefore in June of 1942 you were in no position to give any opinion, legal opinion, as to the validity of any transaction that might come under the Wage and [fol. 416] Hour Act, is that so?

A. No legal opinion.

Q. And Mr. Ryan, as a real estate agent for D. A. Schulte Company, you gave no legal opinion with reference to employers' activities unless you consulted Schulte, is that so?

A. Yes.

Q. Then, Mr. Ryan, am I to understand you would not give a legal opinion, whether there is an obligation or not unless you spoke to Schulte and their attorney, is that so?

A. I do not believe I would give a legal opinion in any instance.

Q. You mentioned the Arsenal Building case. Have you any idea of the name of the plaintiff in that particular action?

A. No.

Q. With reference to the Arsenal Building case, have you any idea when the case was decided in the Supreme Court, approximately?

A. Early part of June 1942.

Q. And have you read the legal decision in any legal book or official report?

A. I read it in the newspaper.

Q. And did you understand the full legal significance of this particular Act as an attorney?

A. Not the full significance, full legal significance, no. I do not know it yet.

Q. So neither at this time nor at that time did you actually know from a legal viewpoint what the full significance of that Act was, is that so?

[fol. 417] A. That is right.

Q. So, therefore, in June of 1942 when you spoke to Mr. Johnson and you stated that you did not think he came under the Act, on what basis did you voice such an opinion?

A. That was my own opinion.

Q. Wasn't that a legal opinion?

A. I don't know if it was a legal or a layman's opinion. I would say the latter.

Q. Mr. Ryan, are we to understand that you would give a legal opinion whether or not employees of a building owned by D. A. Schulte Company came under a particular Wage and Hour Act, and do you say that that is not a legal opinion?

A. I do not know what you mean by legal opinion. Legal advice?

Q. Doesn't it require a legal interpretation to determine whether or not any particular employee came under this particular Act or not?

Mr. Falk: Your Honor, I do not want to object; I do not think the witness needs the benefit of any objection; but Congress contains many members who are not attorneys who nevertheless vote on such matters——

The Court: Let him proceed.

Q. So you gave your opinion, is that so?

A. That is so.

Q. And after you gave this opinion did you speak to your employer about what you told them?

A. Yes.

[fol. 418] Q. And did they say you had a right to give an opinion either way?

A. The question did not come up.

Q. Did they approve of your action?

A. Yes, they agreed, as a matter of fact.

Q. Do you know of your own knowledge whether they consulted any attorneys with reference to that?

A. At that time I don't know.

Q. Had you consulted any attorneys?

A. At that time, no.

Q. At any time when you had conversations with Mr. Johnson or Mr. Gangi had you consulted any attorneys?

A. Yes.

Q. To find out their legal opinion?

A. Yes.

Q. At what time?

A. After the first conversation with Mr. Gangi.

Q. Whom did you speak to?

A. To Mr. Jerome Eisner.

Q. Jerome Eisner?

A. Yes.

Q. Of the firm of attorneys, Ernst, Gale, Bernays, Falk & Eisner, is that so?

A. Yes.

Q. And what did he tell you at that time?

A. He would have to study it.

Q. He had to study it?

A. Yes.

Q. Now, these conversations were frequently or most often in the lobby, is that so, of the building?

A. 50 per cent of the time.

[fol. 419] Q. And you were in a hurry to get to the office, weren't you?

A. Not necessarily.

Q. How long did these conversations take, approximately?

A. Five minutes approximately.

Q. In any of these particular conversations were any figures submitted to you in dollars and cents?

A. No.

Q. Did Mr. Johnson at any time state that he was owed a certain amount of dollars, about $250, or something like that?

A. No.

Q. So at any time the only figures submitted in dollars and cents were the figures on the releases, is that so?

A. That is correct.

Q. Were any counter figures ever submitted when you submitted these figures on the releases?

A. Counter figures by whom?

Q. By the men who subsequently signed the releases.
A. No.

Q. Just to make sure you understand the question, when Mr. Gangi—when you told Mr. Gangi that the release was for $256.36, Mr. Gangi did not reply that you owed him $275?

A. Not that I recall.

Q. None of them contradicted the figures, is that so?
A. I think two did.

Q. Did they submit any other figures?
A. No.

Q. Before arriving at these figures did you show com-
[fol. 420] putations of figures to these elevator men to show them how you arrived at these figures?

A. No.

Q. Isn't it a fact that you told them your office carefully checked these figures and those were the correct amounts, isn't that so?

A. That is correct.

Q. And when you had these different conversations with the men, those with respect to whom you witnessed the signatures, isn't it a fact that you told them, "Here is all the money coming to you and this is in full settlement"?

A. Yes.

Q. Did you mention liquidated damages to each and every one of them?

A. Did I mention that particular wording?

Q. For each man who signed a release, the so-called release, did you say to each one individually as they came in, "You are being paid in full and that covers whatever money due you for liquidated damages"?

A. I did not use the words, "liquidated damages," no.

Q. Isn't it a fact that you did not use the words "liquidated damages" to any one of them?

A. Quite possible.

Q. That is your best recollection, that you said "Here is all the money coming to you in full settlement"; isn't that so?

A. Settlement I said.

Q. That is your best recollection?

A. Yes.

Q. And you said "We are willing to pay you $256," or
[fol. 421] whatever the amount was, "in full settlement of all the claims under the Wage and Hour Act"?

A. Yes, and I said more——

Q. Now——

Mr. Falk: Let the witness answer, Mr. Entes.

Mr. Entes: Please direct your objection to the Court.

Mr. Falk: I object to Mr. Entes interrupting the answer of the witness.

The Court: Let the witness conclude his answer.

Mr. Entes: Excuse me, Mr. Ryan.

A. (Continuing) I said more. Settlement. And I said more with it.

Q. What you told them in substance, Mr. Ryan, is practically what is written on these so-called releases, isn't that so? To refresh your memory I will show them to you and you can read them, and if it is so, state; if not, tell the Court (handing papers to witness).

A. (Examining.)

Q. Have you refreshed your memory, Mr. Ryan?

A. Yes. I said more in addition to what is written on the release.

Q. Tell the Court in substance. You do not have to say the exact language.

A. Yes; that we still did not admit that the building came under the Wage and Hour Act.

[fol. 422] Q. But there was no question about whether or not they were entitled to anything like liquidated damages. Isn't it a fact that you do not even know what liquidated damages are today?

A. Yes.

Q. You do know?

A. Yes, I think I do.

Q. What are liquidated damages?

A. In this instance I think the damages are the equivalent of the overtime that is paid.

Q. Do you know why they call them liquidated?

A. No, I don't know why they call them liquidated.

Q. You do not know the technical definition, what liquidated damages really are?

A. That is correct.

Q. All you know is that it is an amount equivalent to what they have already collected?

A. That is true.

Q. Let us assume for the sake of argument that you had not paid the proper figure; let us say that instead of $256

the figure should have been $275, and you had only paid $256; would you know what the liquidated damages would be in that instance?

Mr. Falk: I object to the question on the ground that there is no dispute here as to the correctness of those amounts.

The Court: He is trying to ascertain whether this witness knows the meaning of liquidated damages. It is only being received for that purpose.

[fol. 423] Q. You can answer, Mr. Ryan. If you don't know, you can say so.

A. Would you ask the question again?

Q. If you had paid Mr. Gangi $256, and by some mathematical error the actual figure should have been $275, and he asked for liquidated damages, would you know how much the liquidated damages would be in that instance?

A. In that instance, no.

Q. Then as far as you know about liquidated damages, all you know is that in this particular case it is an equivalent sum to what the men received, is that so?

A. Yes.

Q. And you have gotten that knowledge from conversations with your attorneys, is that so?

A. Yes.

Q. And you have been here every day in this courtroom and heard the testimony of all the witnesses, is that so?

A. Yes.

Q. And you have consulted with your attorneys after court, I suppose?

A. Yes.

Q. And you had conversations with your attorney, I suppose, Saturday and this morning with reference to the fact that you were going to be a witness on the stand, isn't that so?

A. Yes.

Q. And you gave the same general testimony as you gave now, is that correct?

A. Rehearsed it?

Q. No, not that you rehearsed it; but you told them [fol. 424] approximately what you testified on the stand, isn't that so?

A. I told them approximately what had actually happened.

Q. Now, Mr. Ryan, if you remember, you testified when you spoke with Mr. Gangi the last time, I believe, September 24, 1942, and you showed him the release, he then went out for ten minutes and came back in ten minutes, is that so?

A. Yes.

Q. And then he signed the release?

A. He did.

Q. And what was the conversation you had just before he left?

A. I say the conversation was that "I have the check here for you and here is the release. Will you please sign it."

Q. And what did he say to that?

A. He read the release. He said "I don't know about this; I will have to get some instructions or some information,"—I don't remember the exact wording.

Q. So far as you know, if he did get any instruction, that entire transaction took place in a period of ten minutes, is that so?

A. Yes.

The Court: Did he take the form of the release along with him?

The Witness: He did.

Q. Do you know whether or not he left the premises of the building?

A. That I don't know. He left the room.

[fol. 425] Q. But he came back in ten minutes, is that so?

A. Approximately, yes.

Mr. Entes: That is all.

Redirect examination.

By Mr. Falk:

Q. Now, was Mr. Gangi the first one of the employees to sign and deliver the release to you, Mr. Ryan?

A. No.

Q. Who was?

A. The superintendent.

Q. After Mr. Gunther was Mr. Gangi the first one?

A. Yes.

Q. So no other one of the plaintiffs had signed and delivered the reelase until Mr. Gangi went out of the room with the release and came back and said it was all right?

A. That is correct.

Q. Were the amounts that the plaintiffs received computed at the defendant's office?

A. They were.

Q. And were they subsequently reported to the Wage and Hour Division of the United States Department of Labor?

A. They were.

Mr. Entes: If your Honor please, I move to strike it out. It is immaterial what they did with the reports.

The Court: What are you trying to prove?

Mr. Falk: I want to prove, as long as there has been some question about the computation of the amounts——

[fol. 426] The Court: There is no challenge.

Mr. Entes: If your Honor please, there is no challenge.

The Court: I understand it is conceded that the amounts represent the straight overtime they would have been entitled to under the Act.

Mr. Entes: Yes, it is so stipulated.

Mr. Falk: That was approved by the Wage and Hour Division. I was just going to show that.

Mr. Entes: If your Honor please, I move to strike that out of the record.

The Court: Motion granted.

Q. Now, I want to be sure—I am not a hundred per cent. sure in my own recollection on this point, and it may be a repetition, but did you testify, Mr. Ryan, on your direct examination that the conversation that you had with Mr. Gangi on September 24, 1942, you had substantially with each of the other plaintiffs who signed and delivered their releases to you in exchange for checks?

A. Yes, I had a conversation with each one.

Q. Were these conversations substantially the same as the conversation with Mr. Gangi?

A. Yes.

Q. I am referring now to the conversations of September 24, 1942.

A. That is right.

Q. Were some of the plaintiffs no longer in the employ [fol. 427] of the defendant on that date?

A. Some were no longer in the employ.

Q. And were some of them not present on September 24th?

A. That is correct.

Q. And they gave their releases later, is that correct?

A. Yes; we wrote to them to come to the main office, where they were paid and signed releases.

Q. And as you testified, some of the employees were not present at the time because they were on different shifts?

A. The night men were not present.

Q. Does that explain why some of the releases bear different dates and were witnessed by different people?

A. That is why, yes.

Q. And there is no other reason why?

A. No other reason.

Mr. Entes: I object. The testimony is rather immaterial, and he is leading the witness.

The Court: You are just wasting time.

Q. Now, Mr. Ryan, in cross-examination you were asked about liquidated damages. What do you understand the plaintiffs are suing for here, just in your own words?

A. I understand they are suing for liquidated damages.

Q. And if you had not used that term, how have you been referring to it in your discussion of the subject?

A. Penalty.

[fol. 428] Q. Was "penalty" the word that you used in your conversation?

Mr. Entes: I object to that. He is putting the word in the mouth of the witness. The witness testified he never used any word such as "penalty" or "liquidated damages." He is now leading the witness on to tell him what he said.

The Court: Objection overruled. Go ahead.

The Witness: Will you read the question?

Q. (Read.)

A. Quite possibly. I do not recall exactly.

Q. As long as there has been cross-examination on the point, I ask you to state exactly what was said on that subject regardless of the terminology that was employed be-

tween you and Mr. Gangi and between you and the other plaintiffs on or prior to September 24, 1942.

A. As I handed Mr. Gangi and each of the other employees the check, I said the company still did not feel the building came under the Wage and Hour Act, but rather than go to litigation we were paying straight overtime.

Q. Did you say—and I refer now to Mr. Entes' cross-examination—that the check that you were handing to Mr. Gangi and the other plaintiffs respectively represented anything more than straight overtime?

A. Settlement. I said settlement each time.

[fol. 429] Q. But I mean the computation of the check, did you say to them that it represented a computation of the overtime and these liquidated damages?

Mr. Entes: If your Honor please, I think he is deliberately leading him.

The Court: Just read the question.

Q. (Read).

Mr. Entes: He repeatedly testified what he said.

Mr. Falk: In cross-examination it seemed to me——

The Court: There is no dispute about that. There is not any possible room for dispute. I take stipulations 100 per cent at their face. These figures represent the straight overtime, as the witness calls it, being overtime calculated at the rate specified by the statute but without the addition of the liquidated damages under 16(b).

Mr. Falk: Then I will just ask this question:

Q. Mr. Ryan, at the time Mr. Gangi gave this release and accepted this check, did he say anything to indicate that he understood the check represented just straight overtime and nothing more?

Mr. Entes: If your Honor please, I object to the leading question. If he wishes to ask him——

The Court: Objection sustained.

[fol. 430] Q. Was anything said at the time of that conversation with Mr. Gangi on the subject of what you now refer to as the penalty?

Mr. Entes: If your Honor please, I think he is still using the same line of questioning. He is still leading him. He is trying to put the words in the mouth of the witness. The

answer can be elicited by asking what the conversation was. In every question that was put he has reworded and used the same language to the same effect.

The Court: All right.

Q. What was the conversation, Mr. Ryan, between yourself and Mr. Gangi?

A. At the time I handed him the check?

Q. At the time you handed him the check. The two parts of the conversation, before he left the room and then he returned ten minutes later.

A. Before he left the room I handed him the release and asked him to sign it; and then, of course, he left to do something, I don't know what, and came back and said it was all right, and he signed the release, and I handed him the check, and I said that the paying of this amount—while paying this amount the company still does not agree that the building comes under the Wage and Hour Act, but rather than go [fol. 431] to litigation we are willing — settle.

Q. Did he say anything more?

A. "Thank you," that is about all.

Mr. Falk: That is all.

The Court: You are excused.

(Witness excused.)

Charles S. Wise, called as a witness on behalf of the defendant, being duly sworn, testified as follows:

Direct examination.

By Mr. Falk:

Q. Where do you reside, Mr. Wise?

A. 39 North Poplar Street, West Hempstead, Long Island.

Q. What is your position, sir, or business?

A. Real estate.

Q. What position do you occupy at present?

A. I am in the main office of Schulte.

Q. Is Schulte the defendant in this action?

A. Yes.

Q. How long have you been with Schulte?

A. Almost four years.

Q. What were your duties between the period October 24, 1938 and February 2, 1942?

A. I came into the building in 1940.

Q. What building, Mr. Wise?

A. 575 Eighth Avenue, as a renting agent.

Q. Were you there during the subsequent period up [fol. 432] to and including February 2, 1942?

A. Yes.

Q. Did you spend your full time in that building?

A. Yes.

Q. What were your duties?

A. To negotiate deals with the prospective tenants, collect rents, see that the service in the building was properly conducted.

Q. Did you have an office in that building?

A. Yes.

Q. Where was it located?

A. On the 6th floor.

Q. Who was your immediate superior during that time?

A. Mr. Ryan.

Q. How often would Mr. Ryan come to the building?

A. Oh, at least once a week.

Q. Did he see you on those occasions?

A. Yes.

Q. Now, do you remember any particular occurrence on September 24, 1942?

A. On that day Mr. Ryan came up with a number of checks and a typewritten form which I later found out to be a release——

Mr. Entes: If your Honor please, I object to what the witness found. It is merely a conclusion on his part. I move to strike it out.

The Court: Strike it out.

Mr. Falk: Suppose we identify it.

The Court: Defendant's Exhibit B.

Q. The papers that Mr. Ryan brought with him according to your testimony, were the papers that constitute Defend- [fol. 433] ant's Exhibit B?

A. Yes.

Q. All right, Mr. Wise. I think I interrupted your answer——

The Court: The answer was yes.

Mr. Falk: That was just to correct his characterization

of the papers. But the previous question was, what transpired on September 24, 1942.

A. (Continuing:) Mr. Ryan came into the office with these things and I believe Mr. Gunther, the superintendent, came in with him.

Q. With Mr. Ryan?

A. Yes.

Q. Did you remain in the office?

A. I probably was there most of the time, but my duties may have called me away at brief intervals.

Q. Were you there at a time when Mr. Gangi came in?

A. Yes.

Q. Do you remember seeing Mr. Gangi?

A. Yes.

Q. Who else was present?

A. Mr. Ryan and Mr. Gunther.

Q. Anybody else?

A. No.

Q. The four of you were in the room together?

A. Yes.

Q. What did Mr. Gangi say, if anything, and what did anybody else say to Mr. Gangi, if anything, at that time?

A. What did——

Q. Did any conversation take place among the four of you when Mr. Gangi was in the room?

[fol. 434] A. Mr. Ryan offered him the check——

Mr. Entes: May I object at this time. If the witness is to testify what the conversation of others were with Mr. Gangi, I move to strike out that part of the testimony.

The Court: I do not follow you. If he is going to testify to the conversation you object?

Mr. Entes: No, the conversation with anybody else other than he had.

Mr. Falk: He was present.

The Court: You can tell us all the conversation you heard at that time in the presence of Mr. Gangi.

The Witness: Mr. Ryan handed him the check and said something to the effect that Schulte did not think that the money should be paid but rather than get into a controversy or litigation—I do not remember that word exactly, but just the gist of it—the checks were being offered; and there my memory fails me. I do not remember exactly how it wound up.

Q. What transpired after that, if you remember?

A. The check was offered with the release and Mr. Gangi left the office and returned not long afterwards——

Q. Did he take anything with him when he left?

A. Yes.

Q. What did he take?

A. He took the release. I do not remember whether he [fol. 435] took the check or not.

Q. And when he came back did he have anything with him?

A. Only the release.

Mr. Entes: If your Honor please, I object to what this witness calls it. He alleged he does not know what it is.

The Court: Exhibit B.

Mr. Entes: Exhibit B.

The Court: You do not expect the witness to say Exhibit B. He is identifying a piece of paper. There is no jury here.

Mr. Entes: No, if your Honor please, but for the record it is very easy for defendant's attorney to tell him Exhibit B.

Mr. Falk: Then you would say I was leading him.

The Court: You do not suppose that because this witness calls this paper a release that that is going to carry weight with me in deciding whether it was a release or not?

Mr. Entes: No; just for the record.

The Court: The record is going to be read by Judges. We have got to give them credit for some intelligence. Go ahead.

Q. When he came back did he have this paper with him? [fol. 436] A. Yes.

Q. What if any conversation took place when he came back in the room?

A. I don't remember.

Q. You were still there?

A. Yes.

Q. And the same other two gentlemen, Gunther and Ryan, were still there?

A. Yes.

Q. Do you remember anything further being said?

A. No.

Q. Do you remember what Mr. Gangi did with the piece of paper that he had taken out of the room and brought back?

A. He signed it.

Q. Did he do anything with it after he signed it?

A. He gave it to Mr. Ryan.

Q. Did Mr. Ryan do anything about it?

A. Mr. Ryan gave Mr. Gangi a check.

Q. Did you see any of the other plaintiffs at that time that day?

A. Yes.

Q. Before or after you saw Mr. Gangi?

A. After.

Q. And what transpired when you saw them?

A. The same thing.

Q. Were the same people present?

A. No; they came one other time, and as soon as they concluded their business they left and the other one came in.

Q. Did Mr. Gunther remain during these dealings?

A. Yes.

[fol. 437] Q. Mr. Ryan conducted them in the sense of distributing the checks and receiving back the pieces of paper that were signed by the plaintiffs, is that right?

A. That is right.

Q. Did any conversations ensue at this time? Did Mr. Ryan say anything to these various plaintiffs?

A. Well, if he did it was practically a repetition of what he told Mr. Gangi, in words very much the same, I presume.

Q. You are testifying from memory now?

Mr. Entes: I move to strike it out. He is presuming all this.

The Court: Is your memory clear enough to say that he said substantially the same thing?

The Witness: Yes.

The Court: All right.

Q. I show you two pieces of Defendant's Exhibit B and ask you if you signed those?

A. Yes.

Q. Those are your signatures?

A. Yes.

Q. And were those delivered to you by the plaintiffs whose names appear on them respectively on the dates that appe-

on those pieces of paper? One is September 24 and one is September 25.

A. Yes.

Q. Now, the one of September 24 is the same date as Mr. Gangi and the other plaintiffs delivered similar pieces of [fol. 438] paper to Mr. Ryan. Now, do you recall any reason why this particular one was signed by you as witness?

A. I think I was about to go home and I met him in the subway—in the building or in front of the building, and I went back with him. I remember that quite distinctly.

Q. Mr. Ryan had gone already?

A. Yes.

Q. And the other one, September 25, Mr. Ryan was not in on that day?

A. That is right.

Mr. Falk: That is all.

Cross-examination.

By Mr. Entes:

Q. Mr. Wise, you are not very clear, are you, as to exactly what took place September 24th. Do you remember it very well?

A. I remember it distinctly.

Q. You testified you were present at some times and some times you were not present, is that so?

A. I was present most of the time.

Q. For how many of these people were you present? There are 18 people, about.

A. Yes. Say 15.

Q. I notice that out of these 18 Miss Schulman witnessed I think three different signatures. Would you still say that you witnessed 15 out of the 18?

A. Yes.

Q. And you witnessed all these signatures other than what Miss Schulman witnessed, is that so?

A. I witnessed them being signed. I saw them being signed.

[fol. 439] Q. You just testified that you were not there every time somebody came up, isn't that so?

A. Very likely. The nature of my position——

Q. You can explain what happened.

A. The nature of my position may have called me away for a few minutes. It may not.

Q. You are not definite whether or not you were away or were there, is that so?

A. I was there when most of them were, a majority.

Q. A majority?

A. A majority.

Q. But with respect to some of them, you weren't there?

A. That is right.

Q. And isn't it a fact you don't remember the conversation that took place other than the fact that there was a check being issued?

A. And a conversation such as I summarized previously.

Q. When you say you summarized, do you mean that you guess or to the best of your recollection?

A. To the best of my recollection.

Q. Is that very clear or vague?

A. Quite clear.

Q. Will you tell us what the conversation was that you heard between Mr. Ryan and Mr. Gangi on September 24, 1942?

A. That the company was paying this money although it did not feel it should do so, but it was doing so to avoid [fol. 440] possible—I don't remember the word "litigation"——

Q. All you got——

Mr. Falk: Let him finish.

Mr. Entes: Excuse me. Are you finished?

A. (Continuing:) I don't recollect whether or not he said suit or litigation or trouble.

Q. You don't remember anything else?

A. I don't remember the word.

Q. But all you remember is that the company was paying this money to avoid suit, is that right?

A. In substance.

Q. Nothing else you remember of those conversations, is that so?

A. Yes, I can't remember any other conversation.

Q. And in reference to each one of these individual signers of what you call releases, Defendant's Exhibit B, was the conversation always similar to that?

A. Yes.

Q. Did any of these men in your presence ever state that the amount of moneys as alleged on these releases were insufficient and they wanted a larger sum or smaller sum?

A. One did.

Q. But of the others that were there none of them stated that?

A. No.

Q. They accepted these figures?

A. Correct.

Q. Mr. Wise, did you have money computations of these figures and submit it to the men for their correction?

[fol. 441] A. No.

Q. As far as you know, these men never received any computations from your office? By "your office," I mean the office of your employer with reference to what the pay should be.

A. As far as I know.

Q. And did any of these men make requests from you for this money?

A. No.

Q. And all you know about what transpired is what you heard, saw on September 24, 1942, is that so?

A. That is right.

Mr. Entes: That will be all.

Mr. Falk: No further questions.

The Court: You are excused.

(Witness excused.)

Mr. Falk: The defendant rests.

Mr. Entes: At this time, if your Honor please, there are three of the exhibits witnessed by Miss Schulman, Exhibit Q, the first one I see——

The Court: There is no Exhibit Q in this case. You mean part of the pleading?

Mr. Entes: Exhibit Q in defendant's answer.

The Court: What about it?

Mr. Entes: There is no testimony as to any of the conversations that were had at that time. The plaintiff will concede that the signatures witnessed by Miss Schulman [fol. 442] are genuine, but there is no testimony as to what transpired at that time, so the record does not show whether or not there were any conversations at all other than the fact that these alleged releases were signed and that payment was made.

The Court: Ryan did not deliver the check in those cases?

Mr. Entes: I do not believe so.

The Court: He testified he delivered all the checks.

Mr. Entes: Can I call Mr. Ryan to the stand in reference to that?

The Court: Certainly you may. You may call him rebuttal.

Mr. Entes: Mr. Ryan, please take the witness stand.

HARRY J. RYAN, called as a witness in behalf of the plaintiff, in rebuttal, being previously sworn, testified as follows:

Direct examination.

By Mr. Entes:

The Court: He is now your witness.

Q. Mr. Ryan, I have here Exhibit K which I will show to you in defendant's answer, which is signed by Charles Madonia and witnessed by S. Schulman. Were you present at the signing of that instrument, of that release?

[fol. 443] A. No.

Q. Did you issue the check at that particular time?

A. No.

Q. Did Miss Schulman have the check at that time?

A. She did.

Q. Did Miss Schulman turn over the check to these employees?

A. She did.

Q. I show you Exhibit L in defendant's answer, dated September 30, and is witnessed by Myron L. Menkin. Will you testify similarly for Mr. Menkin?

A. The same answer applies.

Q. And does the same answer apply to Exhibit Q dated September 24, 1942, with reference to the alleged release of William Johnson and witnessed by S. Schulman?

A. That is true.

Mr. Entes: That will be all.

Cross-examination.

By Mr. Falk:

Q. Mr. Ryan, in your conversations with Mr. Johnson and Mr. Gangi, did they state that they were discussing

the subject with you on behalf of all of the employees of the building?

A. They did.

Mr. Entes: If your Honor please, I object to this line of cross-examination. This witness merely testified with reference to three exhibits in defendant's answer, and the [fol. 444] cross-examination is really placing this particular witness as his own witness on entirely new matter.

The Court: He is making him his own witness when he asks him about matters not covered by your direct examination. There is no question about that.

Mr. Entes: All right.

Q. Was that true of your conversation with Mr. Gangi on September 24, 1942?

A. Yes.

Q. Did he indicate to you that what he said to you and what he heard you say to him related to just his own individual transaction or to the transaction of all the men?

A. I would say all as he represented them all.

Q. When he took the paper with him on September 24th and went out of the room and came back and said "O.K.", did he say——

Mr. Entes: Your Honor——

Mr. Falk: Just a minute.

Q. —did he say it was O.K. for just himself or all of the employees?

Mr. Entes: Your Honor, I object to that question. The word "indicate"——

The Court: Objection sustained. The record shows that Gangi testified that he acted on behalf of all of these men. I do not know what more you need on that subject.

[fol. 445] Mr. Falk: That is all.

Mr. Entes: That is all.

(Witness excused.)

Mr. Falk: The defendant rests.

The Court: The defendant has already rested.

Renewal of Motion to Strike

Mr. Entes: The plaintiff at this time renews its motion to strike out the reformation of union contract and accord

and satisfaction and release as a matter of law—that they are deemed insufficient as a matter of law.

With reference to the reformation of union contract, there has been no testimony whatsoever of any kind whether or not there was any mutual mistake of law or mistake on one part or fraud on another——

The Court: All right, no evidence on reformation has been given. Motion to strike is granted.

Mr. Entes: Now, with respect to the release, if your Honor please, the alleged releases which are Defendant's Exhibit B and are alleged as releases as Exhibit A to S in defendant's answer—they are not proper releases inasmuch as they do not specifically inform the party signing such releases that there are any moneys due other than the actual moneys being paid. It is true they say they release all sums, but there is no specific allegation that liquidated [fol. 446] damages is such a sum; and in view of the fact that the Fair Labor Standards Act of 1938 is a statute, a welfare statute specifically enacted to benefit employees in such standard conditions, any release which alleges to be a release must at least inform the signers of such release of all their rights under such release.

Now, if your Honor feels that these exhibits are a general release, then the plaintiffs further urge as a matter of fact that they are still deemed insufficient, and the plaintiffs have submitted a memorandum of law relying solely on three particular decisions, and in those particular decisions there is a case cited, Lofton v. Seneca Coal & Coke Company, 10th Circuit, 126 Fed. (2d), 359, and that particular decision is in full accord with the Fleming v. Warshowsky case, and the Rigopolous case, and the Bailey v. Karolyna case, and I think the mere fact that a factual situation has not arisen previously where a release was pleaded is not to bind this Court. Laws are made for general purposes. Each specific instance cannot be covered by any particular statute. The Court must take into consideration the purpose of the Act and decisions thereunder; and I think the language as expressed in those particular decisions clearly indicated that the employees cannot bargain away or release any claim whatsoever by payment [fol. 447] other than full overtime compensation liquidated damages.

Mr. Falk: Your Honor, I do not want to interrupt, but I rather thought that —— Mr. Entes got up that he had

something else in mind. It seems to me the orderly procedure would have been for me to renew my motions to dismiss.

The Court: Well, he is making a motion to strike out a defense.

Mr. Falk: It does not make any difference.

The Court: Go right ahead.

Mr. Entes: With reference to the defense of accord and satisfaction, I call this to your Honor's attention: Any time there is a payment, the Court may say it is a settlement because somebody paid when somebody makes a claim; but whether there is an honest dispute is another matter. In this particular instance there was no dispute as to the amounts to be paid. It was merely a question that the defendant said they would pay just the overtime pay and they would not pay anything else. There was no difference of figures, no difference of hours. The hours were fixed by standard, regulated union hours. The men accepted on the face value the figures submitted to them and payment was made. The alleged dispute merely [fol. 448] consists of the fact that the defendant said, by the words of his own witnesses, "We do not think we owe you any money. We will just pay you the overtime." Any time anybody makes a payment less than the full sum, they so state. And as a matter of law I do not think that the defense is sufficient, and as a matter of fact the evidence adduced here does not show a really genuine, honest dispute with reference to the parties as to payment.

The Court: Decision reserved on both motions.

Motion to Dismiss Complaint

Mr. Falk: If your Honor please, I should like to renew the motions to dismiss made at the time the plaintiffs rested, and I also should like to move to dismiss the complaint upon the further ground that there is no evidence being offered, nothing in the record to indicate that the plaintiffs or any of them put themselves in a position to attack the effect of the releases which they gave. There is no evidence of any tender of the consideration which they received under their assurance that it was in full settlement, nor of any part of that consideration. They have kept the money, and they represented in getting it that that was to be the end of the matter. That was a settlement in good faith. The Employees concerned indicated not only by

their demands, as the testimony has showed, but in other [fol. 449] respects, that they were fully conversant with not only their rights under the Act, but what they conceived to be their maximum rights. Mr. Gangi who had been negotiating the matter was even so careful, according to his own testimony, as to have the language of Defendant's Exhibit B approved by two particular sources before he signed and delivered it, and advised his colleagues to do the same. He came back in the room, and, according to his own testimony, gave every indication that he was taking that money in good faith to settle out of court,—a question that he knew was one as to which there was a difference of honest opinion. And now, after having held on to the benefits of that transactions, these plaintiffs come into court and seek, on the basis that there is nothing to lose, the liquidated damages, which is a term that I am perfectly willing to discuss, but I think it is a euphemism for penalty. It is nothing more or less than a penalty.

Mr. Entes: If your Honor please, I object to that.

The Court: There is no basis for the objection. There is no witness on the stand.

Mr. Falk: Call it what you will, it is an extra payment. And they now seek to hold on to what they have received [fol. 450] by way of a settlement and compromise and an end of litigation and to get the most that they could have received under any possible construction of the Act even if all the controversial questions had been decided in their favor, and even if the building were covered by the Act, which we not only contend—of course, that is not relevant for this particular part of the argument—but which they well know that the defendant in good faith challenged at the time——

The Court: Is it your contention that the Warshowsky case is bad law, or do you see some basis of distinction?

Mr. Falk: Your Honor——

The Court: If you are not familiar with it at this time, do not try to answer.

Mr. Falk: I would like to just say that that case and some of these other authorities turn on situations where there is no dispute. We think the essence here is that there was an honest dispute between the parties which they attempted to settle out of court.

The Court: There are some propositions of law we can

all agree on. Are we all agreed, or are we not, that an employee and an employer may not today enter into a valid agreement that in the future they are going to compromise out their claims for work under the Fair Labor Standards [fol. 451] Act by paying time and a quarter for overtime on the theory that they are not sure that the Act applies or does not?

Mr. Falk: I agree with that, your Honor.

Mr. Eutes: I agree.

The Court: That they cannot do that?

Mr. Falk: I agree.

The Court: Therefore we all agree that public policy underlying the statute is sufficiently potent to prevent anticipatory waivers. The next question therefore is whether the policy of the law is equally potent in disposing of claims already matured with respect to transactions fully consummated.

Mr. Falk: Well, as to that, sir, we feel very strongly that there certainly is room there for the parties to agree. In fact, I should like to qualify what I said before as to the other proposition to say that I agree fully for the purpose of this case—by that I mean that here in the District Court we must all follow the decisions of the higher courts, and it is not the place to question what the Supreme Court or even the Circuit Courts have decided if these cases are completely applicable. But I do not want to say that if the appropriate situation should arise I would not feel that some of these propositions are ones which might very [fol. 452] well be considered by the courts. Questions of constitutionality even might be involved, as to whether Congress might not have transcended its constitutional powers in some respects.

The Court: Those are all remote questions.

Mr. Falk: I do not want to have an admission here used against my client or used against me as an attorney——

The Court: No, I mean on this state of the law.

Mr. Falk: On this state of the law in this court and this case, I think the first proposition which your Honor stated is one which I fully agree with; and as to the second one, that goes to the subject which I was just discussing before, and I feel very strongly about that. There is nothing in the law and nothing in any of the cases I have seen that would go so far as to say that this settlement was a nullity; that the parties were utterly without power to compromise

their difference, and that they were relegated to a situation where the men either had to sue for an amount that they would have been perfectly satisfied to take without a suit, or the defendant was in a position where no matter what was paid up to the maximum amount, including liquidated damages, would forestall a claim or suit for further money [fol. 453] afterwards.

The Court: Does the statute provide any criminal penalty for wilful violation?

Mr. Entes: Yes, it does.

The Court: Assuming a valid settlement, nevertheless a grand jury might indict and a petit jury might convict if they found a wilful violation?

Mr. Falk: Yes.

The Court: Injunctions can only be applicable prospectively, so that type of situation cannot apply here.

Mr. Entes: May I just state that the criminal angle of the particular act as to wilful violation has nothing to do with the overtime. It is where they try to prevent by intimidation.

The Court: It is a very interesting question. There are two Circuit Court cases that have squarely passed on it, and our Circuit, as far as I read the Rigorpolous case, says they have not made up their minds because they have not had to. The Warsowsky case goes pretty far in its language. I won't say——

Mr. Entes: May I say that the Lofton case goes equally as far as the Fleming case——

The Court: I have not read it. I may have read it on some occasion, but I did not focus my mind on it.

[fol. 454] Mr. Entes: What the defendant is alleging fundamentally is this, that the Act may be harsh or may not be harsh. If the Act is too harsh, it is for Congress to correct——

The Court: No, he is not making that argument.

Mr. Falk: No. I do not think the Act is harsh if properly interpreted.

Mr. Entes: I might site for the record the Overnight Transportation case.

(Discussion off the record.)

The Court: How about briefs, gentlemen? Do you want to submit a brief?

Mr. Falk: I should like to, your Honor, if your Honor feels you want one.

The Court: I do not feel I need one, but I do want your schedule.

Mr. Falk: Yes.

(Discussion off the record.)

The Court: December 22nd for defendant's tabulation and December 24th for plaintiff's analysis.

Decision reserved.

Court is adjourned.

[fol. 455] In United States District Court

Stipulation

It Is Hereby Stipulated by and between the undersigned attorneys for the parties to this action, that the following may be marked in evidence as hereinafter designated with the same force and effect as though they had been offered by the defendant upon the trial of the action and had been received in evidence at the trial:

Deft. Exhibit C—Photostat (23 pages) of floor plans of 575 Eighth Avenue, New York City;

Deft. Exhibit D—Tabulation (3 pages) of all tenants at 575 Eighth Avenue during the period October 24, 1938 and February 5, 1943, showing floors and area occupied during said period;

Deft. Exhibit E—Tabulation of vacant space at 575 Eighth Avenue during period November 1, 1938 to February 1, 1942;

Deft. Exhibit F—Tabulation of space occupied by tenants mentioned in testimony together with space occupied by tenants conceded by defendant to be partially engaged in interstate commerce;

Deft. Exhibit G—Percentage of rented and rentable area covered by concessions made by defendant;

Deft. Exhibit H—Summary of vacancies in 575 Eighth Avenue, November 1, 1938 to February 1, 1942.

Dec. 27, 1943.

Isidore Entes, Attorney for Plaintiff; Ernst, Gale, Bernays, Falk & Eisner, Attorneys for Defendant.

[fol. 456] IN UNITED STATES DISTRICT COURT

Isadore Eates, of New York City (Abrham E. Jacobs, of New York City, of counsel), for plaintiffs.

Ernst, Gale, Bernays, Falk & Eisner, of New York City, (Edwin A. Falk and Abrham Friedman, both of New York City, of counsel), for defendant.

OPINION

RIFKIND, District Judge:

Plaintiffs were employees of the defendant, engaged in the operation and maintenance of a twenty-three story, loft building located at 571/581 Eighth Avenue, in the Borough of Manhattan, in the City of New York. They have brought this action to recover from their employer liquidated damages for violation by the employer of the provisions of Section 7 of the Fair Labor Standards Act of 1938, 29 U. S. C. A. Sec. 207.

The period during which the violation is alleged to have occurred is October 24, 1938 to February 5, 1942. It has been stipulated that on or about September 24, 1942, the employees received an amount equal to the unpaid overtime compensation to which they would have been entitled if they were subject to the provisions of the Act except for the amount of liquidated damages as provided in Section 16, 29 U. S. C. A. Sec. 216.

Defendant denies that plaintiffs were engaged in commerce or in the production of goods for commerce. Affirmatively, defendant pleads the defenses of accord and satisfaction and release in addition to a number of other affirmative defenses, which need not now be considered [fol. 457] since they were stricken out on motion.

If the defenses of accord and satisfaction and release are sufficient in law and are established by the proof, the complaint must be dismissed and the other issue in the case will not require resolution.

There is no substantial dispute as to the facts. Shortly after the decision of the United States Supreme Court in A. B. Kirschbaum Co. v. Walling, 316 U. S. 517, 62 S. Ct. 1116, 86 L. Ed. 1638, decided June 1, 1942, the defendant's district manager was approached by one Johnson, Union shop steward, with a request for consideration of the employees' claim for overtime compensation. The defend-

ant's district manager took the position that the employees of the building were not covered by the provisions of the Act on the ground that the tenants of the building were largely contractors who performed labor for New York manufacturers.

About a week later, the defendant's district manager again spoke to Johnson and told him that the defendant's officers were satisfied that no additional compensation was payable to the employees and that they would not pay any. Johnson responded that he would communicate that decision to his fellow employees, all of whom were members of the Union with which the defendant had a closed shop agreement.

Johnson was succeeded in the office of the shop steward [fol. 458] by plaintiff, Gangi, and in August, the latter informed the district manager that the building employees demanded over-time compensation plus liquidated damages and that, unless the defendant paid an amount, so calculated, to each of the employees, they would institute suit. The district manager responded that he would report the decision of the employees to his superiors. Several weeks later, the district manager reported to Gangi that the defendant denied liability under the Act but, in order to avoid litigation, it was prepared to pay unpaid over-time compensation without liquidated damages. Gangi replied that he would submit the proposal to his fellow employees and the next day reported that the proposal was accepted.

On September 24, 1942, the district manager sent for Gangi and told him that he had checks covering unpaid over-time compensation and a form of release which he asked him to sign. Gangi replied that before he would sign the release he must seek advice. He went away and communicated by telephone with the Wage & Hour Administration and with an official of the Union. He returned, signed the release, delivered it, and accepted the check. The other employees did likewise. Gangi testified that he was fully authorized to conduct these negotiations and to consummate the agreement on behalf of his fellow employees, who are coplaintiffs in this action.

The release, which was signed by each of the plaintiffs, reads as follows: "The undersigned, an employee of D. A. [fol. 459] Schulte, Inc., in premises 575 Eighth Avenue, New York City, does hereby acknowledge receipt of the sum of $—— as payment in full of all sums, if any, which

may be due to the undersigned by said D. A. Schulte, Inc. by reason of the Federal Wage & Hour Act, and the undersigned does hereby release said D. A. Schulte, Inc. from any other further obligations in connection therewith."

Gangi, who testified on behalf of the plaintiffs, gave every evidence of being able, intelligent, and well-informed. Nothing has been suggested to impugn the integrity of the release except the public policy underlying the Act.

Neither before the commencement of the action, nor since, has any one of the plaintiffs paid or tendered to the defendant the amount received by him upon the execution and delivery of the release.

In order to understand the nature of the controversy, or dispute between the plaintiffs and the defendant during the summer of 1942, some additional facts should be mentioned which have a bearing upon the issue of coverage. It appears that the building is tenanted by many persons who serve the dress manufacturing industry. The latter industry, in the City of New York, seems to be organized along the following lines. The dress manufacturer purchases the fabrics and other materials which go into the production of a dress, and usually has the material cut in accordance with his own designs. He maintains a showroom and sales force for the exhibition and sale of his wares. He does not manufacture the dress. The actual [fol. 460] work of fabrication is performed by a number of contractors of whom there are several varieties. One variety consists of so-called dress contractors. They employ a force engaged in sewing garments. The second variety consists of contractors who pleat, trim and stitch. Their work is performed upon the garments either before or after they are handled by the dress contractor, as the designs permit. A third variety consists of those who fabricate belts and similar accessories. All the contractors get the fabrics from the manufacturer and return them, after they have received the benefit of their services, to the manufacturer. These manufacturers are located within the City of New York. The defendant's building was occupied by many of these several varieties of contractors.

If we try to reconstruct the dispute between the plaintiffs and defendant during the summer of 1942, it is evident that one of the questions, which confronted both the plaintiffs and defendant, was: is a building-maintenance employee, employed in a building, which houses tenants,

some of whom are engaged in performing services upon goods belonging to New York manufacturers, engaged in the production of goods for commerce, within the meaning of the Fair Labor Standards Act?

A subsidiary question that necessarily confronted them was: assuming that the former questions depends upon whether the manufacturers sell, in inter-state commerce, the dresses worked upon by the contractors, how difficult [fol. 461] would it be to ascertain the facts with respect to the distribution of the specific garments.

Taking these questions into consideration, I have come to the conclusion that there was a genuine dispute between the parties pertaining to a claim for compensation for a period long past; that the parties, negotiating at arm's length, and without mistake, fraud or misrepresentation, on either part and without overreaching, reached an accord and an agreement for the settlement of their dispute; that the amount agreed upon was an amount equal to the over-time compensation that would be payable if the Act applied without liquidated damages, and that such amount was paid by the defendant and received by the plaintiffs in satisfaction of the claim; that to evidence that transaction, the plaintiffs executed and delivered to the defendant releases under seal and that such accord and satisfaction and release should be given effect unless the statute forbids.

That the statute does forbid giving effect to such a release was stated in Fleming v. Washawsky & Co., 7 Cir., 1941, 123 F. 2d 622; and the contrary view, at least with respect to liquidated damages, was taken in Guess v. Montague, 4 Circ., 140 F. 2d 500. See also Seneeca Coal & Coke Co. v. Lofton, 10 Cir., 1943, 136 F. 2d 359, and Rigopoulos v. Kervan, 2 Cir., 140 F. 2d 506.

If the logical implications of the Warshawsky case are followed out, then the releases here must be rejected as [fol. 462] insufficient. If the Guess case expresses the correct interpretation of the statute, then clearly the releases constitute a bar to the plaintiff's action.

It is my own view that there is no conflict between the public policy of the statute and the equally well-established policy of the law to encourage the amicable adjustment of disputes by arms' length negotiation. I find nothing in the statute which prohibits the settlement of such a past-

due claim, especially if the amount paid in settlement is at least equal to the unpaid overtime compensation.

The parties had a genuine dispute and having settled it, the plaintiffs repudiate the settlement, but tenaciously hold on to the benefits received. If they win, they will collect the liquidated damages. If they lose, they, nevertheless, retain the over-time compensation to which they are not entitled. I do not believe that it is the intention of the statute to drive so wide a breach between law and morals.

Giving effect to the releases, in this case, does not encourage the violation of the Act; it does not permit the parties to accomplish by settlement a lower rate of compensation than they could have agreed upon prospectively. It throws no obstacle whatever in the path of the fullest accomplishment of all the humane and economic purposes contemplated by Congress in the enactment of the Act.

It is a very proper question whether by this decision [fol. 463] I leave one door ajar through which planned violation of the law may be admitted. I have reflected on that matter and have not succeeded in contriving a suppositions case where such a result would be induced. Ingenuity, of course, is an unfathomed well. It is possible that evidence may be presented in such a posture as to suggest the form of a genuine accord when in fact there is none. But the courts have a long experience in detecting the sham which poses as the true. Perhaps, if I were sustaining a compromise providing for the payment of a lesser amount than that which is directed by Section 7 of the Act, the argument of policy might be advanced. See Guess v. Montague, supra.

The plaintiffs had the option of bringing suit and taking the risk of recovering nothing or avoiding that risk by the acceptance of a compromise proposal. Having exercised their option and pocketed the price of the release executed and delivered by them I see nothing in the law which compels the courts to permit them to play "heads I win, tails you lose".

The assertion of this claim is sharp practice, offensive to every moral instinct, and assiduous search of the Statute fails to reveal anything which renders it fair or legal.

Under the circumstances, in the absence of a showing of mistake or overreaching, I see no reason why the courts should not leave the parties in the place where they have

voluntarily put themselves. In the view I have taken of [fol. 464] the defenses of accord and satisfaction and release, I find it unnecessary and indeed inadvisable to pass on the question of coverage, except to indicate that it presents a genuine issue with respect to which I am by no means certain that the plaintiffs have established a prima facie case.[1]

It follows that the complaint must be dismissed.

IN UNITED STATES DISTRICT COURT

Findings of Fact and Conclusions of Law

The issues of this action having regularly come on for trial before the undersigned, without a jury, upon the pleadings and proceedings herein, and the plaintiff having [fol. 465] appeared by his attorney, Isidore Entes, Esq., (Abraham E. Jacobs, Esq., of counsel), and the defendant having appeared by its attorneys, Ernst, Gale, Bernays, Falk & Eisner, Esqs., (Edwin A. Falk, Esq. and Abraham

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[1] The total rentable area during the period in question was approximately 150,000 square feet. Defendant has conceded that three tenants were engaged in the production of goods for commerce to a substantial extent. The percentage of total rentable area occupied by these tenants was as follows: 1939—4.1%; 1940—4.2%; 1941—4.6%. In addition, by a generous appraisal of the testimony, I have found the following tenants to be similarly engaged to a substantial degree: Bass, L. and E. Beilinson, Rieback, Chessin and Schiff. The space occupied by these tenants represented the following percentages of total rentable area: 1939—3/6%; 1940—4.0%; 1941—5.7%. The sum of these percentages is as follows: 1939—7.7%; 1940—8.2%; 1941—10.3%. If the percentages are calculated on the total rented area instead of the rentable area, they are slightly increased.

These ratios relate to space and not to activity. The ultimate question is, of course, whether "a substantial part of an employee's activities related to goods whose movement in the channels of interstate commerce was established by the test we have described", Walling v. Jacksonville Paper Company, 1943, 317 U. S. 564, 572, 63 S. Ct. 332, 337.

Friedman, Esq. of counsel), and the proofs of the parties having been produced and their respective counsel heard and due deliberation having been had therein, I do find and decide as follows:

FINDINGS OF FACT

1. Plaintiff, Salvatore Gangi, brings this action for and in behalf of himself as a building service employee in the building located at 571-583 Eighth Avenue, Borough of Manhattan, City of New York, and for and in behalf of other building service employees and former building service employees employed by the defendant at the said building during the period between October 24, 1938 and February 5, 1942, to recover liquidated damages, costs and attorney's fees pursuant to Section 16 (b) of the Fair Labor Standards Act of 1938 (29 USCA, Section 216 (b), hereinafter referred to as the "Act," for claimed violation by the defendant of the provisions of Section 7 (a) of the said Act (29 USCA, Section 207 (a)). The said plaintiff, Salvatore Gangi, and the said employees and former employees of the defendant are hereinafter referred to as "plaintiffs."

2. Plaintiff, Salvatore Gangi, has been duly designated as agent to bring this action for and in behalf of the said employees and former employees whose names and the amounts claimed by each of them in this suit are as follows:

[fol. 466] *Name*	*Amount*
Salvatore Gangi	256.36
Arthur Weiss	250.20
Anthony Pascale	271.81
Ernest Ciruzzo	255.81
James Gangi	225.97
Albert Dodwell	203.67
Jacob Greenberg	198.15
Salvatore Schiovone	222.29
Otto Tropani	207.72
Joseph Levitt	252.40
Ben Royback	210.77
Charles Madonia	96.88
Myron Menkin	250.41
Fred Knapp	72.98
Murray Goff	140.94

Name	*Amount*
Eugene Messinia	193.61
Arthur Steele	246.63
William Johnson	249.77
Miacheal Solicito	74.39

3. The said building was, during the period between October 24, 1938 and February 5, 1942, managed, operated and controlled by the deefndant, a corporation duly organized under and existing by virtue of the laws of the State of New York, having its principal place of business at 384 Broadway, Borough of Manhattan, City and State of New York.

4. The total rentable area in the said building during the period between October 24, 1938 and February 5, 1942 was approximately 150,000 square feet and during the said period it was occupied by upwards of 90 tenants.

5. Defendant conceded that three of said tenants occupying space in the building during portions of the said period were engaged in the production of goods for commerce to [fol. 467] a substantial extent. The percentage of total rentable area occupied by said three tenants was as follows: 1939—4.1%; 1940—4.2%; 1941—4.6%. If the percentages are calculated on the total rented area instead of the rentable area, they are slightly increased. These ratios relate to space and not to activity.

6. During the period between October 24, 1938 and February 5, 1942, plaintiffs were employed by the defendant as elevator operators, starters, watchmen, engineers, firemen, mechanics, electricians, porters, and handymen in the maintenance and operation of the said building and of the facilities within the said building.

7. That commencing shortly after June 1, 1942 plaintiffs by their duly authorized representatives, William Johnson, and Salvatore Gangi, two of the plaintiffs herein, made repeated demands upo. the defendant that the defendant pay the plaintiffs overtime compensation for the time worked by them in excess of the hours specified in the provisions of Section 7 (a) of the said Act (29 U. S. C. A. 207 (a)), during the period between October 24, 1938 and February 5, 1942, plus liquidated damages, as provided by Section 16(b) of the Act (29 U. S. C. A. Sec. 216 (b)), and that unless

the defendant paid an amount, so calculated, to each of the plaintiffs, plaintiffs would institute suit therefor under the said provisions of the Act.

8. In response to said demands made upon the defendant, the defendant denied liability under the Act.

9. That between June 1942 when the demand for said [fol. 468] overtime compensation and liquidated damages was first made upon the defendant and September 24th, 1942, the parties negotiated a settlement of the dispute between them, under which settlement it was provided that the defendant would pay to each plaintiff and each plaintiff would accept in full settlement of all of his alleged claims an amount equal to the unpaid overtime compensation to which he would have been entitled if the parties were subject to the provisions of Section 7 (a) of the said Act, without liquidated damages.

10. That during the period of the said negotiations and prior to September 24, 1942 there was a genuine dispute between the parties pertaining to the plaintiffs' claims for compensation for overtime worked by them during the period between October 24, 1938 and February 5, 1942.

11. That the parties negotiated at arms length and reached an accord and an agreement for the said settlement of their dispute, without mistake, fraud, misrepresentation or overreaching on either part.

12. That on or about September 24, 1942 and in accordance with the terms of the said settlement and accord the defendant paid to each plaintiff and each plaintiff accepted in full settlement of all of his alleged claims an amount equal to the unpaid overtime compensation to which he would have been entitled if the parties were subject to the provisions of Section 7 (a) of the said Act.

13. That at the time the plaintiffs accepted the said [fol. 469] amounts each of them executed and delivered to the defendant a receipt and release under seal reading as follows (the blank space for the amount being filled in in each case with the amount actually paid to the individual signing the release):

> "The undersigned, an employee of D. A. Schulte, Inc., in premises 575 Eighth Avenue, New York City, does

hereby acknowledge receipt of the sum of $
as payment in full of all sums, if any, which may be due to the undersigned by said D. A. Schulte, Inc. by reason of the Federal Wage & Hour Act, and the undersigned does hereby release said D. A. Schulte, Inc. from any other further obligations in connection therewith."

14. That neither before the commencement of this action nor since has any one of the plaintiffs paid back or tendered to the defendant the amount received by him upon the execution and delivery of the release.

Conclusions of Law

1. The Court has jurisdiction of the parties and of the subject matter.

2. The accords and satisfactions duly made and consummated between the parties on or about September 24, 1942 constitute a bar to recovery by the plaintiffs of liquidated damages, costs and attorneys' fees for which this suit is brought pursuant to Section 16 (b) of the said Act (29 U. S. C. A. Sec. 216 (b)).

3. The releases duly executed by the plaintiffs and duly delivered to the defendant on or about September 24, 1942 constitute a bar to recovery by the plaintiffs of liquidated damages, costs and attorneys' fees for which this suit is [fol. 470] brought pursuant to Section 16 (b) of the said Act (29 U. S. C. A. Sec. 216 (b)).

4. Defendant's defense of accord and satisfaction, set forth in its answer as its "Second Defense" to the claims alleged in the complaint by plaintiff Salvatore Gangi, in his own behalf, is sustained.

5. Defendant's defense of accords and satisfactions, set forth in its answer as its "Third Defense" to the claims alleged in the complaint by plaintiff Salvatore Gangi, in behalf of the other employees and former employees of the defendant, who are plaintiffs in this action, is sustained.

6. Defendant's defense of release set forth in its answer as its "Fourth Defense" to the claims alleged in the complaint by plaintiff Salvatore Gangi, in his own behalf, is sustained.

7. Defendant's defense of release set forth in its answer as its "Fifth Defense" to the claims alleged in the complaint by plaintiff Salvatore Gangi, in behalf of the other employees and former employees of the defendant who are plaintiffs in this action, is sustained.

8. Defendant's "First Defense" of insufficiency of the complaint to state a cause of action is dismissed.

9. Defendant's "Sixth Defense" of estoppel is dismissed.

10. Defendant's "Seventh Defense" and counterclaim of reformation is dismissed.

[fol. 471] 11. Defendant's "Eighth Defense" is dismissed.

12. Defendant is entitled to judgment against the plaintiffs, dismissing the complaint herein upon the merits, with costs and disbursements to the defendant, and the Clerk of this Court is directed to enter such judgment accordingly.

Dated, New York, N. Y. January 14th, 1944.

Simon A. Rifkind, U. S. D. J.

In United States District Court

Judgment

This cause having duly come on for trial before the undersigned, without a Jury.

Now upon the pleadings and proceedings had herein and upon the opinion of this Court dated December 28, 1943, duly filed herein and upon the Findings of Fact and Conclusions of Law dated January 14, 1944, duly filed herein, it is, after due deliberation

Ordered and Adjudged that the plaintiff's complaint herein be and it hereby is dismissed upon the merits, and it is further

Ordered and Adjudged that the defendant recover from the plaintiff the sum of $47.50, as its costs and disbursements herein as taxed by the Clerk of this Court and that [fol. 472] defendant have execution thereof.

Approved.

Simon H. Rifkind, U. S. D. J.

Dated, New York, N. Y., January 20, 1944.

Judgment rendered.

George J. H. Follmer, Clerk.

Dated, New York, N. Y., January 20, 1944.

In United States District Court

Notice of Appeal

Please Take Notice, that Salvatore Gangi, suing in behalf of himself and other employees and former employees of defendant similarly situated the plaintiff in this action hereby appeals to the United States Circuit Court of Appeals for the Second Circuit, from the final judgment of the United States District Court for the Southern District of New York, entered herein in the office of the Clerk of the Court, on the 20th day of January 1944, whereby it was adjudged that the plaintiff's complaint be dismissed and that the defendant recover of the plaintiff the sum of $47.50 costs, and from the whole and each and every part of said judgment.

Dated, New York, April 10, 1944.

[fol. 473] Yours, etc., Isidore Entes, Attorney for Plaintiffs, Office & P. O. Address, 521 Fifth Avenue, New York City.

To: George J. H. Follmer, Clerk of Southern District of N. Y.

Ernst, Gale, Bernays, Falk & Eisner, Esqs., Attorneys for Defendant, Office & P. O. Address, 40 Wall St., New York City.

In United States District Court

Stipulation as to Contents of Record

It Is Hereby Stipulated and Agreed by and between the attorneys for the respective parties hereto that the contents of the record on appeal are designated as follows and that the following constitute a complete record relevant to this appeal and all proceedings in evidence upon the trial of this action.

1. Statement under Rule XIII of the United States Circuit Court of Appeals, Second Circuit.
2. Summons.
3. Complaint.
4. Answer.
5. Stipulation adding Joseph Levitt as a party plaintiff.
6. Stipulation fixing the amount of recovery of plaintiff and other employees in the event of recovery.

[fol. 474] 7. Court stenographer's minutes of trial.
8. All Exhibits.
9. Stipulation as to admissibility in evidence of Defendants Exhibits C to H inclusive.
10. Opinion.
11. Finding of facts and Conclusions of Law.
12. Judgment.
13. Notice of Appeal.
14. Stipulation designating contents of record on appeal.
15. Stipulation as to Exhibits.
16. Clerk's certificate.

Dated, New York, August 24, 1944.

Isidore Entes, Attorney for the Plaintiffs; Ernst, Gale, Bernays, Falk & Eisner, Attorneys for the Defendant.

IN UNITED STATES DISTRICT COURT

STIPULATION AS TO EXHIBITS

It Is Hereby Stipulated and Agreed by and between the attorneys for the respective parties hereto that no exhibit marked at trial need be included in the typewritten record on appeal and that all exhibits which were received in evidence upon the trial may be referred to in briefs and [fol. 475] produced upon the argument of the appeal by either party with the same force and effect as if the same had been typewritten in full on the record on appeal.

Dated, New York, August 24, 1944.

Isidore Entes, Attorney for Plaintiffs. Ernst, Gale, Bernays, Falk & Eisner, Attorneys for Defendant.

IN UNITED STATES DISTRICT COURT

STIPULATION AS TO RECORD

It Is Hereby Stipulated and Agreed that the foregoing is a true transcript of the record of the said District Court in the above entitled matter as agreed upon by the parties.

Dated, New York, N. Y., Sept. 15, 1944.

Isidore Entes, Attorney for Plaintiffs-Appellant.
Ernst, Gale, Bernays, Falk & Eisner, Attorneys for Defendant-Appellee.

[fol. 476] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 477] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, OCTOBER TERM, 1944

No. 134

(Argued June 11, 1945. Decided July 20, 1945)

SALVATORE GANGI, Plaintiff-Appellant,

v.

D. A. SCHULTE, INC., Defendant-Appellee

Before Swan, Chase and Clark, Circuit Judges

Appeal from the District Court of the United States for the Southern District of New York

Action by Salvatore Gangi, on behalf of himself and nineteen others similarly situated, against D. A. Schulte, Inc., as their employer, to recover overtime wages, liquidated damages, and attorneys' fees under the Fair Labor Standards Act of 1938. From a judgment for defendant on its affirmative defenses of accord and satisfaction and release, D. C. S. D. N. Y., 53 F. Supp. 844, plaintiffs appeal. Reversed and remanded.

Isidore Entes, of New York City, for appellant.

Abraham Friedman, of New York City (Ernst, Gale, Bernays, Falk & Eisner and Edwin A. Falk, all of New York City, on the brief), for appellee.

OPINION

[fol. 478] CLARK, Circuit Judge:

Appellant, suing on behalf of himself and nineteen others, brought this action under § 16(b) of the Fair Labor Standards Act of 1938, 29 U. S. C. A. § 216(b), to recover amounts claimed to be due them under § 7, 29 U. S. C. A., § 207, because of the failure of appellee, their employer, to pay them overtime wages from October 24, 1938, to February 5, 1942, for their services as maintenance employees in appellee's twenty-three story loft building at 571-583 Eighth Avenue,

New York City. After the decision of the Supreme Court in *A. B. Kirschbaum Co.* v. *Walling*, 316 U. S. 517, 524, June 1, 1942, holding that the Act applied to maintenance employees where the tenants of a building are engaged principally "in the production of goods for interstate commerce," the employees at appellee's building, through two representatives of their union, demanded that appellee pay them the overdue overtime compensation and an equal amount as liquidated damages. Appellee denied liability in the belief that the tenants of the building were not engaged principally "in the production of goods for interstate commerce." For approximately two months it refused to pay. Then, since appellants threatened suit, it offered to pay all the overtime compensation without the liquidated damages. Appellants accepted, and upon receipt of payment each one executed a formal release under seal, acknowledging receipt of the specified sum as "payment in full" of all sums due under the Act and releasing appellee from "any other or further obligations in connection therewith." Seven months thereafter they instituted this action. The District Court upheld affirmative defenses of accord and satisfaction and release, D. C. S. D. N. Y., 53 F. Supp. 844, and dismissed the complaint. The questions before us on this appeal are whether the releases are valid, and if invalid whether the Act covers these appellants.

[fol. 479] The releases must be held ineffective to bar the action. In *Brooklyn Sav. Bank* v. *O'Neil*, and *Dize* v. *Maddrix*, 65 S. Ct. 895, decided since the judgment below, the Supreme Court has now determined that an employee's mere written waiver of his right to liquidated damages does not bar a subsequent action. Appellee makes much of the fact that the Court there expressly declined to pass upon the validity of a settlement made as a result of a bona fide dispute, as that was not the case under consideration.[1] Since the District Court here found such a dispute to exist, it urges us to uphold these settlements as a valid accord

[1] The Court took occasion to cite law-review articles dealing with the problem, as well as the differing views among the lower courts, making separate reference to decisions holding that "right to unpaid minimum wages and overtime compensation constitute a single right." *Brooklyn Sav. Bank* v. *O'Neil*, 65 S. Ct. 895, 900, n. 13, 903, n. 21.

and satisfaction.[2] But in *Fleming* v. *Post*, 2 Cir., 146 F. 2d 441, 443, where this court adopted the rule later approved in the *O'Neil* case that a release of liquidated damages was invalid, it went on to say definitely that "we should reach the same result if there were here an accord and satisfaction." And no other result would be in keeping with the policy and provisions of the Act. For as this court pointed out in *Rigopoulos* v. *Kervan*, 2 Cir., 140 F. 2d 506, 507, 151 A. L. R. 1126, the employer's liability for unpaid overtime [fol. 480] compensation and liquidated damages in an additional equal amount "is a single and entire liability," which "is not discharged in toto by paying one-half of it." That being so, it is certainly not discharged by the employer's mere assertion, no matter how vigorous, that he does not come within the Act. Otherwise employers would have available a simple method for avoiding "the deterrent effect which Congress plainly intended that Section 16(b) should have." *Brooklyn Sav. Bank* v. *O'Neil*, *supra*, 65 S. Ct. 895, 903.[3]

In practical fact the *O'Neil* case does not offer support for appellee's contention. For there, too, the employer disputed coverage, finally paid the overtime wages due, and

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[2] While the District Court did find that there was "a genuine dispute" between the parties, yet it shows that this was entirely as to the coverage, and came about because of the employees' claim for overtime compensation "shortly after" the *Kirschbaum* decision, 316 U. S. 517, and obviously because of it. And it treated the problem of release and accord and satisfaction as one, relying particularly upon *Guess* v. *Montague*, 4 Cir., 140 F. 2d 500, the basis of the decision below in the *Dize* case, now repudiated, 65 S. Ct. 900. There was no haggling over amounts here; when appellee made its offer, it was accepted. 53 F. Supp. 844, 845, 846.

[3] Of course the problem is one to be determined by the public policy disclosed in the Act, rather than by rigorous legal analysis; but, bearing in mind the common-law insistence on consideration for an accord and satisfaction, *Rigopoulos* v. *Kervan*, *supra*, it would seem anomalous that a payment inadequate under the Act to support a formal release might yet be sufficient consideration for an accord.

forced suit to be brought for the balance. Except for the fact that the present appellee may have been more vociferous in its assertion that its business is local,[4] the facts here are exactly the same as those in the *O'Neil* case. It may be that, where there is a genuine dispute not as to the law of the Act, but as to facts, such as the amount of labor actually performed, the parties may work out together a fair adjustment of the dispute and that it was this type of situation which the Supreme Court wished to reserve for further consideration. But use of a disagreement as to the legal interpretation of the Act, turning upon the nature of the employer's business, as a basis for reducing payments under those required by the Act, appears definitely prohibited by the *O'Neil* case. See 57 Harv. L. Rev. 257; 55 [fol. 481] Harv. L. Rev. 150; 43 Col. L. Rev. 355, 359; *cf.* also Dodd, Administration of Workmen's Compensation, 1936, 186 *et seq.*

So far as the coverage of the Act is concerned, we think that, in the light of our decisions and the standards followed by the Wage and Hour Administrator, the employees were within its protection for at least a part of the period involved. In *Callus* v. *10 East Fortieth Street Building, Inc.*, 2 Cir., 146 F. 2d 438, this court applied the principle of the *Kirschbaum* case to uphold the Administrator's standard that building maintenance employees are within the protection of the Act when more than 20 per cent of the building is occupied by tenants engaged in the production of goods for interstate commerce. Though the Supreme Court reversed this decision in *10 East 40th Street Building, Inc.* v. *Callus*, 65 S. Ct. 1227—on the ground that the building there was actually occupied for offices and not for manufacturing, even though some of them were administrative offices of interstate producers—it did not discuss or repudiate the Administrator's standard. Hence in *Baldwin* v. *Emigrant Industrial Sav. Bank*, 2 Cir., July 12, 1945, we concluded that the standard was still reasonable and applicable. We think that is particularly true as applied to a loft building such as the one here involved, which is located in the garment district of New York City and which regularly rents factory space for the production of finished articles. Indeed the bulk of tenants are contractors manufacturing goods on the premises.

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[4] Even this would seem doubtful; see note 2, above.

The District Court found, however, that in the years 1939, 1940, and 1941 respectively, interstate producers occupied only 7.7%, 8.2%, and 10.3% of the available area. Appellants claim that twelve additional tenants produced goods for interstate commerce. And the testimony clearly shows that at the time of production these tenants had at [fol. 482] the very least reasonable grounds to anticipate that their products would move in other states. This is all that had to be shown to constitute them interstate producers. *Warren-Bradshaw Drilling Co.* v. *Hall*, 317 U. S. 88, 92; *United States* v. *Darby*, 312 U. S. 100, 118, 132 A. L. R. 1430. These tenants occupied 11.16%, 16.16%, and 23.44% [5] of the space in 1939, 1940, and 1941 respectively. When these figures are added to those of the District Court, then from 1940 on more than 20 per cent of the building was occupied by concerns producing goods for interstate commerce. During this period, therefore, appellants have shown that they were covered by the Act.

The parties have stipulated as to the amount of liquidated damages due should appellants' contention be sustained by us. But their computation is based upon the entire period beginning October 24, 1938, whereas we find that only the period after January 1, 1940, should be included. Since under the authorities the sums paid to secure releases are applied as partial payments of the amounts due, the computation of those amounts must be made by the District Court on remand, in the light of the stipulation, but with deduction of the payments already made from the totals due for both overtime compensation and liquidated damages from 1940 on. The judgment will be for the balance without interest, but with costs and reasonable attorneys' fees. The sum of $250 is allowed as attorneys' fees for services performed on this appeal.

Reversed and remanded.

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[5] These figures represent appellee's computation. Appellants' computation yields somewhat different figures. But both agree that when the twelve disputed tenants are included, more than 20 per cent of the building was occupied by interstate producers during 1940 and 1941 only. The District Court's finding for 1941 covers the period to its end on February 5, 1942.

[fol. 483] DISSENTING OPINION

CHASE, Circuit Judge (dissenting):

The district judge found on adequate evidence that there was a bona fide dispute over coverage and that the parties dealt at arm's length in reaching an accord as to that followed by its satisfaction by the payment of the overtime wages which would have been due had there been coverage, but without the payment of liquidated damages. In so doing, these employees acted with the knowledge and approval of an official of their union and only after their representative had communicated with the Wage and Hour Division. The facts as to the kind and amount of activity engaged in by the tenants of the building cannot, I think, be determined without weighing the evidence to arrive at the statement of them found in the majority opinion. That is not within our province but the district court should be left free to do that on the remand. That court, which alone has jurisdiction to do so in the first instance, has not yet found the essential facts as to coverage, the district judge saying, "In the view I have taken of the defenses of accord and satisfaction and release, I find it unnecessary and indeed inadvisable to pass on the question of coverage, except to indicate that it presents a genuine issue with respect to which I am by no means certain that the plaintiffs have established a prima facie case."

Moreover, I cannot agree with my brothers that it was erroneous to hold the accord and satisfaction a bar to this suit. It does not seem to me that it was held in *Brooklyn Savings Bank* v. *O'Neil*, 65 S. Ct. 895 that, where a bona fide dispute as to liability does exist, a doubtful claim for liquidated damages may not be released in consideration for the payment in full of a doubtful claim for minimum wages and overtime. Anything to the contrary in *Fleming* [fol. 484] v. *Post*, 2 Cir., 146 F. (2) 441 was said in a case where no bona fide dispute as to liability was shown.

Here there was no overreaching by anybody and if ever parties to a real dispute as to liability may finally settle their differences on the basis of a fair compromise duly carried out as agreed that was done in this case. As the district judge well said in his opinion, "The plaintiffs had the option of bringing suit and taking the risk of recovering nothing or avoiding that risk by the acceptance of a compromise proposal." It seems to me that enlightened public

policy ought to permit employees, competently advised as to their rights, to have and to exercise such an option whenever they have the desire and opportunity to do so in cases where the controversy as to liability is based on substantial grounds. I cannot believe, until and unless authoritatively so advised, that they must be restricted to an "all or nothing" gamble.

[fol. 485] IN UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT

SALVATORE GANGI, etc., Plaintiff-Appellant,

v.

D. A. SCHULTE, INC., Defendant-Appellee

Appeal from the District Court of the United States for the Southern District of New York

JUDGMENT—Filed July 20, 1945

This cause came on to be heard on the transcript of record from the District Court of the United States for the Southern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is reversed with costs; the sum of $250.00 is allowed as attorneys' fees for services performed on this appeal; and the cause remanded for further proceedings in accordance with the opinion of this court.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

Alexander M. Bell, Clerk.

[fol. 486] [File endorsement omitted.]

[fol. 487] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 488] PLAINTIFF'S EXHIBIT NO. 1

571-81 Eighth Avenue

Tenant	Space	Period
Sea Island Thread Mfg. Corp.	southerly half of 2nd floor & entire 3rd floor	2/ 1/35-12/31/40
Paul Schiff	front space on 2nd floor	6/ 1/40- 1/31/44
Bernard Shapiro, Inc.	northerly half of 2nd floor	4/ 5/37- 1/31/40
Max S. Yuni	4th floor south	2/ 1/41- 1/31/44
Wm. Jarkown	4th floor south	8/ 1/40-10/29/40
Ruben Orelick	4th floor south	2/ 1/38- 5/14/40
Nathan Shapiro	northerly half of 4th floor	2/ 1/39- 1/31/41
Samuel Boyce	northerly portion on 5th floor	8/ 1/41- 1/31/44
Samuel Sunshine	southerly portion on 5th floor	8/ 1/41- 1/31/44
Metropolitan Button Works Inc.	entire 5th floor	10/ 1/33- 1/31/44
Nat Bass	southeast unit on 6th floor	1/ 1/35-11/30/42
Sidney Schiller	southwest unit on 6th floor	2/ 1/41- 4/ 9/42
[fol. 489]		
Herman Perlman & Vito Dia	southwest unit on 6th floor	2/ 1/35- 1/31/40
Sidney Rosenthal	northeast unit on 6th floor	2/ 1/39- 1/31/44
Philip Rosenthal	northeast unit on 6th floor	2/ 1/35- 1/31/39
Abraham Ash	north center of 6th floor	1/ 1/40-11/17/41
Osias Rieder	northwest unit on 6th floor	12/ 1/39- 1/31/44
Henry Cooperman	northwest unit on 6th floor	9/ 1/36-11/30/39
Bergen & Germanowitz	southeast unit on 7th floor	2/ 1/37- 1/31/44
Franks Merigone	southwest unit on 7th floor	8/ 1/35- 1/31/44
Abraham Ash	northwest unit on 7th floor	3/ 1/39-12/31/39
Al Merkin & Selma Merkin	northwest unit on 7th floor	2/ 1/38- 9/29/39
Isie Landesman	northeast unit on 7th floor	2/ 1/38-11/30/39
Columbia Belt Co. Inc.	north unit on 7th floor	2/ 1/41- 1/31/44
[fol. 490]		
Benjamin Weinstein	south unit on 8th floor	2/ 1/38- 1/31/44
Ansonia Frocks, Inc. & Morris Silverstein & Harry Gross	northerly portion on 8th floor	2/ 1/41- 1/31/44
Levy-Blum & Goldschmidt Corp.	northerly portion on 8th floor	7/ 1/37- 1/31/40
Star Stitching Mfg. Corp.—Star Pleating Corp.	entire 9th floor	2/ 1/37- 9/20/42
Morris Landau	south unit on 10th floor	2/ 1/39- 1/21/43
Meyer Appel & Mack	northerly half of 10th floor	2/ 1/37- 1/31/44
Dicherman & The Grand Embroidery & Hemstitching Whs. Inc.		

Tenant	Space	Period
Atlas Creations, Inc.	front center on 11th floor	12/ 1/40- 1/31/44
Isidor Chessin	southeast unit on 11th floor	2/ 1/35- 1/31/40
Isidor Chessin & Israel Schneider	south unit on 11th floor	2/ 1/40- 1/31/44
Berg & Trager	northeast unit on 11th floor	9/15/33- 1/27/42
Morris Wolkin	northwest unit on 11th floor	6/ 1/41-11/27/42
Jos. Swernofsky & Irving Swernofsky	northwest unit on 11th floor	2/ 1/37-11/27/40
[fol. 491]		
Abraham Brensiber	southeast unit on 12th floor	2/ 1/37- 1/31/44
Richard Gray	southwest unit on 12th floor	2/ 1/36- 9/30/42
Peter Spanzia	northeast unit on 12th floor	2/ 1/38- 1/31/44
Max Baker	northwest unit on 12th floor	1/ 1/42- 3/25/42
Pollock & Rappaport	northwest unit on 12th floor	10/ 1/40-10/29/41
Jerry Jarkow-Wm. Jarkow	northwest unit on 12th floor	3/ 1/40- 7/31/40
Model Pleating & Stitching Corp.	northwest unit on 12th floor	2/ 1/38- 1/31/40
Horowitz, Spaner & Tru Classy Frock	southeast unit on 13th floor	2/ 1/36- 1/31/44
Isie Landesman-Sam Landesman	southwest unit on 13th floor	2/ 1/39- 1/31/44
Mannie Bernstein	southwest unit on 13th floor	4/15/39- 8/31/39
Max Dobshutz	southwest unit on 13th floor	2/ 1/37- 1/31/39
[fol. 492]		
L. & D. Beilinson	northeasterly unit on 13th floor	5/ 1/41- 1/31/44
Katz & Martin A. Berman	northeasterly unit on 13th floor	2/ 1/35- 1/31/39
Philip Katz	northeasterly unit on 13th floor	2/ 1/39- 6/11/40
Levine & Nachman	northwest unit on 13th floor	2/ 1/37- 1/31/44
Levy-Blum & Goldschmidt Corp.	Entire 14th floor	2/ 1/40-12/ 1/41
Molly Levy & Benjamin Levy Florence Blum & Sidney Blum Benjamin & Ruth Goldschmidt	Entire 14th floor	12/ 1/41- 1/31/44
Herman Zweig	Southeast corner of 14th floor	2/ 1/37- 1/31/40
Charles Dimonda	southwest unit on 14th floor	4/ 1/38- 2/ 6/39
Samuel Stout	northeast unit on 14th floor	3/ 1/39-12/18/39
M. Morris Fluss	northwest unit on 14th floor	7/ 1/39-11/30/39
Marion Ciappa	northwest unit on 14th floor	4/ 1/36- 3/ 1/39
Sam Yablon	southeast unit on 15th floor	2/ 1/39- 1/31/44

Tenant	Space	Period
Maurice Newman	southwest unit on 15th floor	11/ 1/40- 1/31/44
Samuel Stout	southwest unit on 15th floor	1/ 1/40- 7/31/40
[fol. 493]		
Jack Herzog & Bro. Inc.	southwest unit on 15th floor	9/ 1/34- 1/31/39
Schottenfeld & Salzberg	northeast unit on 15th floor	2/ 1/35- 1/31/44
Artcraft Belts Inc.	northwest unit on 15th floor	6/ 1/41- 9/ 5/42
Maurice Newman	northwest unit on 15th floor	2/ 1/37-10/31/40
Harry Wang & Samuel E. Batlan	southeast unit on 16th floor	2/ 1/34-12/10/42
Abraham Ash	southcenter unit on 16th floor	12/ 1/41-12/15/42
Evelyn Herlan-Geo. S. Tizzani	southcenter unit on 16th floor	5/ 1/39-11/10/41
Isidore Feld	southcenter unit on 16th floor	2/ 1/37- 1/31/39
Vincent Giamberdini	southwest unit on 16th floor	2/ 1/35-12/31/42
Max Schneider	northeast unit on 16th floor	2/ 1/35- 1/28/42
Alfred Atlass	northwest unit on 16th floor	12/15/40-10/31/42
Samuel Cholnar	northwest unit on 16th floor	8/ 1/39- 2/29/40
Abraham Kaufman Sadie Kaufman	entire 17th floor Entire 17th floor	2/ 1/40- 1/31/31 2/ 1/41- 1/31/44
[fol. 494]		
Schimel, Neukrug & Rieder	southwest unit on 17th floor	1/ 1/38-12/13/39
Paul F. Craziano	front center unit on 17th floor	9/ 1/36- 1/15/39
Chas. Kramer & Henry Marks & Kaymark Dresses Inc.	north portion of 17th floor	9/ 1/41- 4/ 6/42
A. Small Co. Inc.	north portion of 17th floor	6/ 1/31- 4/23/41
Lou Blond	southerly loft on 18th floor	2/ 1/39-12/18/39
Rose Ray Frocks	southerly loft on 18th floor	12/19/39- 1/31/44
Schrader & Bazarnick	northeast unit & northwest unit on 18th floor	2/ 1/35- 1/31/44
H. Maimin & Co., Inc.	rear center on 18th floor	1/ 1/41- 1/31/44
Alfred Atlass	northwest unit on 18th floor	7/ 1/40-12/14/40
Morris Fluss	northwest unit on 18th floor	12/ 1/39- 3/15/40
Nathan Wells	northwest unit on 18th floor	2/ 1/40- 1/31/44
Moe H. Rosenzweig	northwest portion of 18th floor	2/ 1/39-10/31/39
Hyman Eisen	northwest unit on 18th floor	2/ 1/36- 1/31/39
Aaron Hershkowitz	southeast unit on 19th floor	2/ 1/35- 1/31/43

[fol. 495]

Tenant	Space	Period
Israel Lazev	southwest unit on 19th floor	11/ 1/34-12/ 2/41
Moe H. Rosenzweig	Front center unit on 19th floor	11/ 1/39- 1/31/44
Kammin & Meadow	front center unit on 19th floor	4/ 1/38- 8/28/39
Riback Trimming Corp.	northeast unit on 19th floor	2/15/40- 1/31/44
Samuel Schaffer	north portion of 19th floor	2/ 1/39-12/30/39
Nathan Wells	northwest unit on 19th floor	2/ 1/40- 1/31/44
Samuel Schaffer	northwest unit on 19th floor	2/ 1/36-12/30/39
Maurice D. Steindl	southeast unit on 20th floor	2/ 1/39- 1/31/44
Agnes Sullivan	southwest unit on 20th floor	2/ 1/35- 1/31/44
Carmine Fristachi	northeast unit on 20th floor	5/ 1/35- 1/31/44
L. Hirschfield & Co. Inc.	northwest unit on 20th floor	6/ 1/41- 6/ 6/42
Wm. Zweifach	northwest unit on 20th floor	4/ 1/34-12/ 4/40
H. Maimin Co. Inc.	easterly unit on 21st floor	2/ 1/39- 1/31/44
Max D. Diamond	southerly unit on 22nd floor	10/ 1/34- 1/31/43
[fol. 496]		
Benjamin Fischler	Northerly unit on 22nd floor	6/ 1/39- 1/31/44
Abraham Benenson	22nd floor	4/ 1/35- 1/31/39
Raizen & Trager	southerly unit on 23rd floor	2/ 1/34- 1/31/44
Thomas Muscarella	northerly unit on 23rd floor	2/ 1/35- 1/31/44

[fol. 497] DEFENDANT'S EXHIBIT "A"

D. A. SCHULTE, INC.

(A. Schulte)

Imported, Key West and Domestic Cigars

Telephone Canal 6-5620 to 5630

Executive Offices, 384-386 Broadway, New York

The undersigned, an employee of D. A. Schulte, Inc. in premises 575 Eighth Avenue, New York City, does hereby acknowledge receipt of the sum of $256.36 as payment in full of all sums, if any, which may be due to the undersigned by said D. A. Schulte, Inc. by reason of the Federal Wage &

Hour Act and the undersigned does hereby release said D. A. Schulte, Inc. of and from any other or further obligations in connection therewith.

Dated, New York, N. Y., Sept. 24, 1942.

Salvatore Gangi (L.S.).

Witness: H. I. Ryan.

[fols. 498-517] (By stipulation, Defendant's Trial Exhibit "B" is not printed. This exhibit consists of the originals of the releases signed by all of the respondents and all of them are the same as defendant's Exhibit "A" except for the signature and amount appearing thereon.)

[fols. 518-540] (By stipulation, Defendant's Exhibit "C" is not printed. It comprises twenty-three pages of floor plans of 575 Eighth Avenue, New York City.)

[fol. 541] DEFENDANT'S EXHIBIT "D"

(Per Stipulation Dec. 27, 1943)

Tabulation of all Tenants at 575-81-8th Ave. During the Period Oct. 24, 1938 and Feb. 5, 1942 showing floors and area occupied during said Period

Floor Street & Mezz.	Tenant	Area (Sq. Feet)	Period of Occupancy	Months Occupied
	Restaurant & Retail, etc.			
2	Sea Island Thread Co.	8485	10-24-38 To 2- 5-42	39
3	Sea Island Thread Co.	4018	10-24-38 To 12-31-40	26
2	Paul Schiff	7940	10-24-38 To 12-31-40	26
2	Bernard Shapiro	1519	6- 1-40 To 2- 5-42	20
4	Max Yuni	3519	10-24-38 To 1-31-40	15
4	N. Shapiro	3900	2- 1-41 To 2- 5-42	12
4	W. Jarkow-R. Orelick	3640	2- 1-39 To 2- 5-42	36
5	S. Boyke	3900	10-24-38 To 10-29-40	24
5	Met. Button Co.	3400	8- 1-41 To 2- 5-42	6
5	S. Sunshine	7678	10-24-38 To 1-31-41	27
6	Nat. Bass	4278	8- 1-41 To 2- 5-42	6
6	Sidney Schiller	1650	10-24-38 To 2- 5-42	39
6	Herman Perlman & Vito Dia	2178	2- 1-41 To 2- 5-42	12
6	Sidney Rosenthal & Philip Ros.	1613	10-24-38 To 1-31-41	27
6	Abraham Ash	450	10-24-38 To 2- 5-42	39
6	Osias Rider	1050	1- 1-40 To 11-17-41	23
6	Henry Cooperman	1050	12- 1-39 To 2- 5-42	37
7	Bergen & Germanowitz	2368	10-24-38 To 11-30-39	13
7	Franks Merigone	2450	10-24-38 To 2- 5-42	39
7	Abraham Ash	1000	10-24-38 To 2- 5-42	39
7	Al Merkin & Selma Merkin	1000	3- 1-39 To 12-31-39	10
7	Isie Landesman	1000	10-24-38 To 9-29-39	11
7	Columbia Belt Co. Inc.	2162	10-24-38 To 11-30-39	13
8	Benjamin Weinstein	3378	2- 1-41 To 2- 5-42	12
8	Ansonia Frocks	4164	10-24-38 To 2- 5-42	39
8	Levy Blum & Goldschmit	4164	2- 1-41 To 2- 5-42	12
9	Star Stiching & Pleating	8260	10-24-38 To 1-31-40	15
10	Morris Landau	4064	10-24-38 To 2- 5-42	39
10	Meyer Appel etc.	3626	2- 1-39 To 2- 5-42	36
11	Atlas Creations	850	10-24-38 To 2- 5-42	39
11	Isidor Chessin	850	12- 1-40 To 2- 5-42	26
11	Isidor Chessin & I. Schneider	2978	10-24-38 To 1-31-40	15
11	Berg & Treger	1661	10-24-38 To 2- 5-42	39
11	Morris Wolkin	1382	10-24-38 To 2- 5-42	39
11	Jos. & I. Swernofsky	1382	6- 1-41 To 2- 5-42	8
12	A. Brensilder	1700	10-24-38 To 11-27-40	13
12	Richard Gray	2064	10-24-38 To 2- 5-42	39
12	P. Spinzia	1900	10-24-38 To 2- 5-42	39
12	Max Baker	1210	1- 1-42 To 2- 5-42	1
12	Polfock & Rappaport	1210	10- 1-40 To 10-29-41	13
12	J. & W. Jarkow	1210	3- 1-40 To 7-31-40	5
12	Model Pleating & Stitching Co.	1210	10-24-38 To 1-31-40	15
13	Horowitz, Spaner & True C. Frock	1630	10-24-38 To 2- 5-42	39
[fol. 542]				
13	Isie & Sam Landesman	2107	9- 1-39 To 2- 5-42	28
13	Mannie Bernstein	2107	4-15-39 To 8-31-39	4½
13	Max Dobshutz	2107	10-24-38 To 1-31-39	3
13	L. & D. Beilinson	1616	5- 1-41 To 2- 5-42	9
13	Katz & Martin Berman	1616	10-24-38 To 1-31-39	3
13	Phillip Katz	1616	2- 1-39 To 6-11-40	17½
14	Levy Blum & Goldschmidt	8260	2- 1-40 To 12- 1-41	23
14	Molly Levy, etc.	8260	12- 1-41 To 2- 5-42	2
14	Herman Zweig	2060	10-24-38 To 1-31-40	15

14	Charles Dimonda	2000	10	24	38	To	2	6	39	3
14	Samuel Stout	2100	3	1	39	To	12	18	39	10
14	M. Morris Fluss	2100	7	1	39	To	11	30	39	5
14	Marion Chiappe	2100	10	24	38	To	3	1	39	4
15	Sam Yablon	1090	2	1	39	To	2	5	42	36
15	Maurice Newman	1316	10	24	38	To	10	31	40	24
15	Samuel Stout	2159	1	1	40	To	7	31	40	7
15	Jack Herzog & Bros. Inc.	2159	10	24	38	To	1	31	39	3
15	Maurice Newman	2159	11	1	40	To	2	5	42	15
15	Arteraft Belts	1316	6	1	41	To	2	5	42	8
16	Wang & Batlan	1553	10	24	38	To	2	5	42	39
16	Abraham Ash	550	12	1	41	To	2	5	42	2
16	Herlan Tizzani	550	5	1	39	To	11	10	41	30
16	Isiroe Feld	550	10	24	38	To	1	31	39	3
16	Vincent Gamberdini	1427	10	24	38	To	2	5	42	39
16	Max Schneider	1900	10	24	38	To	1	31	42	39
16	Alfred Atlass	1244	12	15	40	To	2	5	42	13½
16	Samuel Cholmar	1244	8	1	39	To	2	29	40	7
17	Abram & Sadie Kaufman	3148	2	1	40	To	2	5	42	24
17	Schimel, Neukrug & Rieder	3148	10	24	38	To	12	13	39	14
17	Paul Craziano	800	10	24	38	To	1	15	39	3
17	Kramer, Marks	3100	9	1	41	To	2	5	42	5
17	A. Small	3100	10	24	38	To	4	23	41	18
18	Lou Blond	2872	2	1	39	To	12	18	39	11
18	Rose Ray Frocks	2872	12	19	39	To	2	5	42	26
18	Schrader & Bazarnich	2800	10	24	38	To	2	5	42	39
18	H. Maimin & Co.	630	1	1	41	To	2	5	42	13
18	Alfred Atlass	630	7	1	40	To	12	14	40	6
18	Morris Fluss	630	12	1	39	To	3	15	40	4½
18	Moe H. Rosenzweig	630	2	1	39	To	10	31	39	9
18	Hyman Eisen	630	10	24	38	To	1	31	39	3
19	Aaron Hershkowitz	1092	10	24	38	To	2	5	42	39
19	Israel Lazev	1272	10	24	38	To	12	1	41	37
19	Moe H. Rosenzweig	672	11	1	39	To	2	5	42	27
19	Kamin & Meadow	672	10	24	38	To	8	28	39	10
19	Riback Trimming Co.	856	2	15	40	To	2	5	42	24
19	Samuel Schaffer	856	2	1	39	To	12	30	39	10
19	Samuel Schaffer	1240	10	24	38	To	12	30	39	14

[fol. 543]

19	Nathan Wells	1240	2	1	40	To	2	5	42	24
20	Maurice Steindl	750	2	1	39	To	2	5	42	36
20	Agnes Sullivan	2085	10	24	38	To	2	5	42	39
20	Carmine Fristachi	1284	10	24	38	To	2	5	42	39
20	L. Hirschfield & Co.	1237	6	1	41	To	2	5	42	8
20	W. Zweifach	1237	10	24	38	To	12	4	40	25
21	H. Maimin & Co.	5921	2	1	39	To	2	5	42	36
22	Max D. Diamond	2472	10	24	38	To	2	5	42	39
22	Benjamin Fischler	2550	6	1	39	To	2	5	42	32
22	Abraham Benenson	2550	10	24	38	To	1	30	39	3
23	Raizen & Trager	2427	10	24	38	To	2	5	42	39
23	T. Muscarella	2277	10	24	38	To	2	5	42	39

(Here follow 2 pasters, side folios 544 and 545)

[fol. 544]

Defendant's Exhibit "E"

(Per Stipulation December 27, 1943)

Tabulation of Vacant Space in 57=5-8th Ave., N. Y. C.

During Period Nov. 1, 1938 to Feb. 1, 1942

Floor	Space	Area	Period of Vacancy	Months	Vacant Area x Months of Vacancy 1938*	1939	1940	1941	1942**
2	Southerly portion	4018	1- 1-41 To 2- 5-42	13				48216	4018
2	Northerly portion	2040	2- 1-40 To 2- 5-42	12			22440	24480	2040
2	North-easterly portion	1519	1-31-40 To 6- 1-40	4			6076		
3	Entire third floor	7940	1- 1-41 To 2- 5-42	13				87340	7940
4	Southerly half	3900	5-14-40 To 8- 1-40	1-11-40 To 2-1-41			17550	3900	
4	Northerly half	3640	10-24-38 To 2- 1-39	3	7280	3640			
5	Entire floor	7678	2- 1-41 To 8- 1-41	6				46068	
6	Northeast portion	1613	10-24-38 To 2- 1-39	3	3226	1613			
6	North central portion	450	10-24-38 To 1- 1-40;	12/1/41 To 2/5/42	900	5400		450	450
7	Northerly portion	2000	10-30-39 To 2- 1-41	3		4000	2000		
8	Northerly portion	4164	1-31-40 To 2- 1-41	12			45804	4164	
11	Northwest portion	1382	11-30-40 To 6- 1-41	6			1382	6910	
12	Northwest portion	1210	1-31-40 To 3- 1-40;	8-1-40 To 10-1-40, 11-1-41 To 1-1-42			3630	2420	
13	Southwest portion	2107	2- 1-39 To 4-15-39	3½		6321			
13	Northeast portion	1616	6-11-40 To 5- 1-41	11			11312	6464	
14	Southwest portion	2000	2- 6-39 To 2- 1-40	12		22000	2000		
14	Northwest portion	2100	3- 1-39 To 7- 1-39;	12-1-39 To 2-1-40		10500	2100		
14	Northeast portion	2100	10-24-38 To 3- 1-39;	1-1-40 To 2-1-40	4200	4200	2100		
15	Southeast portion	1090	10-24-38 To 2- 1-39	3	2180	1090			
15	Southwest portion	2159	2- 1-39 To 1- 1-40,	8-1-40 To 11-1-40		23749	6477		
15	Northwest portion	1316	11- 1-40 To 6- 1-41	7			9632	6580	
16	South center portion	550	2- 1-39 To 5- 1-39;	3		1650			
16	Northwest portion	1244	10-24-38 To 8- 1-39;	3-1-40 To 12-15-40	2488	8708	11818		
17	Southerly half	3148	1- 1-40 To 2- 1-40	1			3148		
17	Northwest portion	1200	5- 1-41 To 9- 1-41,	4				4800	
17	Northeast portion	1900	5- 1-41 To 9- 1-41	4				7600	
18	Southerly ½	2872	10-24-38 To 2- 1-39	3	5744	2872			
18	Northwest portion	630	4- 1-40 To 1- 1-41	9			5670		
19	Southwest portion	1272	12- 2-41 To 2- 5-42	2				1272	1272
19	Northwest portion	1240	1- 1-40 To 2- 1-40	1			1240		
19	East central portion	672	9- 1-39 To 11- 1-39	2		1344			
19	Northeast portion	856	10-24-38 To 2- 1-39	3	1712	856			
20	Northwest portion	1237	12- 4-40 To 6- 1-41	6			1237	6185	
20	Southeast portion	750	10-24-38 To 2- 1-39	3	1500	750			
21	Entire floor	5921	10-24-38 To 2- 1-39	3	11842	5921			
22	Northerly ½	2550	2- 1-39 To 6- 1-39	4		10200			
					41072	114414	148616	256849	15720
	Total rentable area x months				300000	1800000	1800000	1800000	150000
	Total actual rented area x months				258928	1685586	1651384	1544151	134280

* Nov. and December 1938.
** January 1942.

[fol. 545]

DEFENDANT'S EXHIBIT "F"

(Per Stipulation December 27, 1943)

Tabulation of Space Occupied by Tenants Mentioned in Testimony together with Space Occupied by Tenants Conceded by Defendant to be Partially Engaged in Interstate Commerce.

	Floor	Area Occupied by Tenant	Period of Occupancy by Tenant	Total Months by Tenant	Total rentable area 150,000 sq. ft: 1938 Rented Area x Months	1939 Rented Area x Months	1940 Rented Area x Months	1941 Rented Area x Months	1942 Rented Area x Months	Total
Max Yuni	4th Floor	3900	2- 1-41 To 2- 5-42	12				42900	3900	46800
S. Sunshine	5th Floor	4278	8- 1-41 To 2- 5-42	6				21390	4278	25668
Columbia Belt Co.	7th Floor	2162	2- 1-41 To 2- 5-42	12				23782	2162	25944
Benjamin Weinstein	8th Floor	3378	10-24-38 To 2- 5-42	39	6756	40536	40536	40536	3378	131642
Ansonia Frocks	8th Floor	4164	2- 1-41 To 2- 5-42	12				45804	4164	49968
Levy Blum & Goldschmidt	8th Floor	4164	10-24-38 To 1-31-40	15	8328	49968	4164			62460
Chessin & Schneider	11th Floor	2978	10-24-38 To 2- 5-42	39	5956	35736	35736	35736	2978	116142
Chessin & Schneider	11th Floor	850	10-24-38 To 11-30-39	13	1700	9350				11050
L. & E. Beilinson	13(14)	1616	5- 1-41 To 2- 5-42	9				12928	1616	14544
Max Schneider	16(17)	1900	10-24-38 To 2- 5-42	39	3800	22800	22800	22800	1900	74100
A. Kaufman	17(18)	3148	2- 1-40 To 2- 5-42	24			34628	37776	3148	75552
H. Maimin	18(19)	630	1- 1-41 To 2- 5-42	13				7560	630	8190
Riback Trimming Co.	19(20)	856	2-15-40 To 2- 5-42	24			9416	10272	856	20544
Agnes Sullivan	20(21)	2085	10-24-38 To 2- 5-42	39	4170	25020	25020	25020	2085	81315
H. Mainin	21(22)	5921	2- 1-39 To 2- 5-42	36		65131	71052	71052	5921	213156
Paul Schiff	2	1519	6- 1-40 To 2- 5-42	20			10633	18228	1519	30380
N. Shapiro	4	3640	2- 1-39 To 2- 5-42	36		40040	43680	43680	3640	131040
Star Pleating & Stitching	9	8260	10-24-38 To 2- 5-42	39	17520	100120	100120	100120	8260	322140
Richard Gray	12	2064	10-24-38 To 2- 5-42	39	4128	24768	24768	24768	2064	80496
Maurice Newman	15(16)	2159	11- 1-40 To 2- 5-42	15			4318	25908	2159	32385
Vincent Gamberdini	16(17)	1427	10-24-38 To 2- 5-42	39	2854	17124	17124	17124	1127	55653
Schrader & Bazarnich	18(19)	2800	10-24-38 To 2- 5-42	39	5600	33600	33600	33600	2800	109200
Nathan Wells	19(20)	1240	2- 1-40 To 2- 5-42	24			13640	14880	1240	29760
Maurice Steindl	20(21)	750	2- 1-39 To 2- 5-42	36		8250	9000	9000	750	27000
Raizen & Trager	23(24)	2427	10-24-38 To 2- 5-42	39	4854	29124	29124	29124	2427	94653
Maurice Newman	15(16)	1316	10-24-38 To 10-31-40	24	2673	15832	13160			31584
Levy Blum & Goldschmidt	14(45)	8260	2- 1-40 To 2- 5-42	24			90860	99120	8260	198240
Atlas Creations		850	12- 1-40 To 2- 5-42	14			850	10200	850	11900
Abraham Ash	7	1000	3- 1-39 To 12-31-39	10		10000				10000
Abraham Ash	6	450	1- 1-40 To 11-17-41	12			5400			5400
		80192								2136906

Note: The total rentable area 150,000 sq. feet times the number of months during the periods in suit:

1938	1939	1940	1941	1942	Total
300000	1800000	1800000	1800000	150000	5850000

[fol. 546]

Defendant's Exhibit "G"

(Per Stipulation December 27, 1943)

Percentage of rented and rentable area covered by concessions made by Defendant

Tenant	Total Area	*1938	1939	1940	1941	1942**
H. Maimin (50%)	630 (18th Fl.)				630	630
H. Mainmin (50%)	5921 (21st Fl.)		From Feb. 1 5921	5921	5921	5921
Atlas Creations (75%)	850 (11th Fl.)			From 12-1-40 850	850	850
Abr. Ash	(20%) 1000 (7th Fl.)		From Mar. 1 1000			
Abr. Ash	(20%) 450 (6th Fl.)			450	To 11-17-41 450	
Abr. Ash	(20%) 550 (16th Fl.)				From 12-1-41 550	550
Conceded area x months		0	75131	76452	84337	7951
Actual rented area x months		129,464	1685586	1651384	1543151	134280
Percentage of rented area conceded to be engaged partially in producing goods for interstate commerce		0	4.45%	4.63%	5.46%	5.92%
Rentable area x months		300,000	1800000	1800000	1800000	150000
Percentage of rentable area of 150,000 sq. ft. conceded by defendant to be engaged partially in producing goods for interstate commerce		0	4.17%%	4.24%%	4.68%	5.3%

* November & December 1938.
** January 1942.

[fol. 547] DEFENDANT'S EXHIBIT "H"

(Per Stipulation December 27, 1943)

Summary of Vacancies in 571-5-8th Ave., New York, N. Y.

Nov. 1, 1938 to Feb. 1, 1942

And Net Rented Area during same Period

	1938	1939	1940	1941	1942
Total rentable area	150,000	150,000	150,000	150,000	150,000
Rentable area x months	*300,000	1,800,000	1,800,000	1,800,000	**150,000
Area vacant x months	41,072	114,414	148,616	256,849	15,720
Net Rented area x months	258,928	1,685,586	1,651,384	1,543,151	134,280
Actual net rented area by years	129,464	140,465	134,282	128,596	134,280

* 1938—November and December.
** 1942—January.

[fol. 548] Clerk's Certificate to exhibits omitted in printing.

[fol. 549] SUPREME COURT OF THE UNITED STATES

STIPULATION AS TO PRINTED RECORD—Filed August 29, 1945

It Is Hereby Stipulated by and between the attorneys for the above-named parties that the following portions of the record filed in the United States Circuit Court of Appeals for the Second Circuit on the appeal in the action entitled "Salvatore Gangi, suing in behalf of himself and other employees and former employees of defendant similarly situated, Plaintiff against D. A. Schulte, Inc., Defendant" be omitted in the printing of the transcript of record to be filed with the Clerk of the Supreme Court of the United States:

(1) Exhibits "B" to "S," inclusive, annexed to defendant's answer, appearing at pp. XXI to XXIX, inclusive. In place of the said exhibits, the Clerk may print the following:

> "By stipulation, Exhibits 'B' to 'S', inclusive, are not printed, but each of them is the same as Exhibit 'A' except for the name and amount appearing thereon."

[fol. 550] (2) Defendants trial Exhibit "B." Instead, the following should appear:

"By stipulation, Defendant's Trial Exhibit 'B' is not printed. This exhibit consists of the originals of the releases signed by all of the respondents and all of them are the same as Defendant's Exhibit 'A' except for the signature and the amount appearing thereon."

(3) Defendant's Exhibit "C." Instead, the following should appear:

"By stipulation, Defendant's Exhibit 'C' is not printed. It comprises twenty-three pages of floor plans of 575 Eighth Avenue, New York City."

Dated, New York, August 27, 1945.

Ernst, Gale, Bernays, Falk & Eisner, Attorneys for D. A. Schulte, Inc., Petitioner. Isidore Entes, Attorney for Salvatore Gangi, etc.,

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[fol. 551] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed November 19, 1945

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Jackson took no part in the consideration or decision of this application.

IN THE

Supreme Court of the United States

October Term, 1945

No. 517

DE A. SCHULTE, INC.,

Petitioner,

against

SALVATORE GANGI, suing on behalf of himself and other employees similarly situated,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

EDWIN A. FALK
ABRAHAM FRIEDMAN
Counsel for Petitioner

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IN THE

Supreme Court of the United States

October Term, 1945

No.

D. A. SCHULTE, INC.,

Petitioner,

against

SALVATORE GANGI, suing on behalf of himself and other employees similarly situated,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner, D. A. Schulte, Inc., respectfully prays that a writ of certiorari be issued out of and under the seal of this Court to review the decision of the United States Circuit Court of Appeals for the Second Circuit, rendered on July 20, 1945, which, by a divided court, reversed a judgment of the United States District Court for the Southern District of New York dismissing the respondent's complaint on the merits.

Jurisdiction

Jurisdiction to review this case upon writ of certiorari is conferred upon this Court by Judicial Code, §240a, as amended, 28 U. S. C. §347 (a), 8 F. C. A., Title 28, §347 (a).

The opinion of the Circuit Court of Appeals for the Second Circuit was filed July 20, 1945. An order upon stipulation of the parties was made by the said court staying the mandate until October 20, 1945, pending the filing of this petition for certiorari.

Opinions Below

The opinion of the District Court is reported in 53 Fed. Supp. 844, and is also printed in the record (R. 309-314).

The majority opinion of the Circuit Court of Appeals and the dissenting opinion of Judge Chase appear in 150 Fed. (2) 694 and are also printed in the record (R. 322-328).

Questions Presented

The questions presented by this petition are:

1. Whether the Fair Labor Standards Act of 1938 (29 U.S.C., Section 201 *et seq.**) prohibits a *bona fide* settlement of claims for overtime compensation and statutory liquidated damages under Sections 7 (a) and 16 (b) of the Act (29 U.S.C., Secs. 207 (a), 216 (b)) where the settlement is made as the result of a *bona fide* dispute between an employer and its employees with respect to coverage under the Act, and the employees are paid under the settlement all the overtime compensation to which they would have been entitled had they been within the protection of the Act.

---

* C. 676, 52 Stat. 1060, hereinafter referred to as the "Act".

2. Whether the employees may recover statutory liquidated damages and counsel fees under Section 16 (b) of the Act under a claim for non-payment of overtime under Section 7 (a) of the Act where it is found in a suit for such damages and counsel fees instituted after such *bona fide* settlement that the employees were not entitled to all the overtime compensation claimed and received by them because during a substantial part of the period for which they made such claim they were not within the protection of the Act.

If the answers to the foregoing questions are in the affirmative, then

3. Whether building maintenance employees are within the protection of the Act if the facts relied on to establish coverage of the employees show only that some of the tenants in the building receive, work on and return in intrastate commerce goods belonging to local owners who are not tenants of the building and that subsequently some of the said goods are sold and shipped by such non-tenant owners in interstate commerce, there being no proof either that at the time of production such tenants had any knowledge of the ultimate destination of the goods worked on by them or that at the time of production the non-tenant owners had any prior orders or agreements to sell and ship any part of the completed goods in interstate commerce.

Statute Involved

Pertinent provisions of the Fair Labor Standards Act of 1938 (52 Stat. 1060, 29 U. S. C., Section 201 *et seq.*) are set forth in the Appendix.

Statement

Respondent suing in behalf of himself and eighteen other building maintenance employees employed at petitioner's twenty-three story loft building at 571-583 Eighth Avenue, New York City, instituted this action against petitioner solely for the recovery of liquidated damages and counsel fees under Section 16(b) of the Fair Labor Standards Act of 1938 (29 U. S. C. 216(b)) in amounts equal to the sums which he and said other employees had previously been paid by petitioner upon the settlement of a dispute of claims for overtime compensation and such liquidated damages under Sections 7 and 16(b) of the Act, (29 U. S. C. Secs. 207, 216(b)).

Under the settlement, negotiated by respondent as the union representative of the said employees at the said building, petitioner paid each of the said employees an amount equal to the unpaid overtime compensation to which he would have been entitled if he were subject to the Act during the entire period for which such claims for overtime compensation and liquidated damages were made in the dispute, to wit, October 24, 1938, the effective date of the Act (29 U.S.C. 206(b)), to February 5, 1942. At the time such payments were received, respondent and said other employees executed and delivered to petitioner their releases of all further claims under the Act (R. 24-5, Def. Ex. A, R. 332-3).

At all times petitioner has denied its liability under the Act. Petitioner's answer to the complaint contained such denial and also affirmatively pleaded the defenses of accord and satisfaction and release. The Court below held that there was no coverage during a substantial part of the period in dispute (R. 326).

During the said period, the building in which respondent and the other employees worked as elevator operators, watchmen, handymen, mechanics, porters, etc., was occupied by upwards of ninety tenants (R. 47, Pl. Ex. 1, R.

329-332), a large number of whom were engaged in activities connected with the ladies' garment industry in New York City. Some of the tenants were so-called contractors who performed various kinds of labor—sewing or stitching, pleating and trimming or fabricating accessories—on and out of materials owned by and delivered to them by so-called garment manufacturers who had their offices, showrooms and shipping rooms elsewhere in New York City.

After completing their services, the materials were returned by the tenants to the manufacturers who either had other contractors finish the materials into completed garments or, if they were received in their completed state from the tenants, exhibited and sold them at wholesale, along with other garments worked on by other contractors.

A number of the tenants worked for several such local manufacturers while practically all of the manufacturers had several other contractors, not tenants of the building, also working on their goods.

The only relationship of the tenant-contractors to the manufacturers was that of independent contractors employed to do a specific production operation in the manufacture of garments from materials sent them by the manufacturer-owners.

Proof was made upon the trial that ultimately some of the garments worked on by some of the tenant-contractors were sold and shipped by the manufacturers in interstate commerce. But there was no proof that any manufacturer had a contract or order for the sale and shipment of any of the goods in interstate commerce, while they were in the contractor's possession.

In June, 1942, shortly after this Court held in *Kirschbaum* v. *Walling*, 316 U. S. 517, that the Act applied to maintenance employees of buildings where concededly the tenants were engaged in producing goods for interstate commerce, the maintenance employees at petitioner's building, through respondent and another employee represen-

tative of their union, which had a closed shop agreement with petitioner, demanded that petitioner pay them additional compensation for all time worked by them since October 24, 1938 in excess of the hours prescribed in Section 7(a) of the Act and an equal sum as liquidated damages under Section 16(b) of the Act (R. 29, 39, 276). Petitioner denied liability under the Act because the tenants in the building engaged in the garment trade were principally contractors who dealt only with New York City manufacturers (R. 274-5). The employees repeated their demands and upon being advised that petitioner would not pay, they threatened suit (R. 29, 276-7). Not desiring to go to the trouble and expense of litigating the issues involved in the dispute, petitioner offered to compromise and settle the dispute by paying to all of the employees all of the overtime compensation demanded for the entire period since October 24, 1938, the effective date of the Act, without the liquidated damages (R. 34, 278). After considering the offer and consulting with the local Wage and Hour Administrator's office and an official of their union (R. 25-6, 41), the employees accepted the offer (R. 34-37, 278). Petitioner thereupon paid all of the employees all of such overtime compensation as agreed and it received from each of the employees his duly executed release of all further claims under the Act (R. 279-281).

Seven months later the respondent who had negotiated the settlement, instituted this suit under Section 16(b) of the Act.

After trial without a jury, at which all of the facts bearing upon the disputed liability and all of the facts relating to the negotiation and consummation of the settlement were presented, the District Court found (R. 312):

> "* * * that there was a genuine dispute between the parties pertaining to a claim for compensation for a period long past; that the parties negotiating at arm's length, and without mistake, fraud or misrepresentation on either part and without over-

reaching, reached an accord and an agreement for the settlement of their dispute, that the amount agreed upon was an amount equal to the overtime compensation that would be payable if the Act applied without liquidated damages, and that such amount was received by the plaintiff(s) in satisfaction of the claim; that to evidence that transaction the plaintiffs executed and delivered to the defendant releases under seal and that such releases should be given effect unless the statute forbids."

The District Court held that neither the Act nor the public policy underlying the Act prohibits a settlement made in such circumstances as this settlement was made, "especially if the amount paid in settlement is at least equal to the unpaid over-time compensation", claimed by the employees (R. 313) and accordingly it sustained the defenses of accord and satisfaction and release and dismissed the complaint (R. 314).

Thus the District Court found it unnecessary to pass on the question of coverage "except to indicate that it presents a genuine issue with respect to which I am by no means certain that the plaintiffs have established a *prima facie* case", (R. 314), and in a footnote at this point in its opinion it set out the facts upon which it predicated its doubt on that issue.*

Upon appeal from the District Court's dismissal of the complaint, the Circuit Court of Appeals reversed (R. 322-6), one Judge dissenting (R. 327-8).

In reversing the District Court, the Circuit Court held (1) that the Act prohibits the *bona fide* settlement of a genuine dispute as to coverage and (2) that "for at least a part of the period involved" the employees were within the protection of the Act (R. 325). It found coverage for

* Upon the appeal below the facts in the said footnote were accepted by both sides as a finding, and are treated as such in the prevailing opinion of the Court below (R. 326).

twenty-five months and non-coverage for fourteen months of the period covered by the dispute and it remanded the case to the District Court for the purpose of computing the amount of the judgment to be entered against petitioner, the sums paid by petitioner on the settlement to be applied as partial payments on the amount found to be due for that part of the period involved during which the Circuit Court found that the Act applied to the building in suit.*

---

* Petitioner's building had 150,000 square feet of rentable space, which was occupied by more than ninety tenants during the period in suit; October 24, 1938, to February 5, 1942 (Pl.'s Ex. 1, R. 329-332; Deft.'s Ex. F, R. 336B). The District Court found "by a generous appraisal of the testimony" that in 1939, 7.7% of the space was occupied by eight of such tenants engaged in the production of goods for interstate commerce, that in 1940, 8.2% of the space was occupied by such tenants and that in 1941, 10.3% of the space was occupied by such tenants (R. 314, footnote 1). In November, 1943, the Administrator of the Act adopted a standard of 20% of space occupancy for determining whether a substantial portion of a building is devoted to production for interstate commerce for the purpose of bringing building maintenance employees within the Act (Wage and Hour Division Release No. PR-19 [rev.], November 19, 1943). Applying the said standard to the District Court's findings the maintenance employees at petitioner's building were not subject to the Act at any time within the period in suit.

To the foregoing percentages of occupancy, the Circuit Court of Appeals added the percentages of total space occupied by twelve additional tenants claimed by respondent also to have been engaged in the production of goods for interstate commerce although the testimony concerning the said twelve tenants had been rejected by the District Court as being insufficient to support such a finding. Such addition brought the percentages of occupancy for the years 1940 and 1941 above the Administrator's 20% standard, and the Circuit Court therefore held that during those two of the more than 3 years involved the respondent and his fellow-employees were within the Act.

Upon the trial no evidence was offered that, at the times any of the additional twelve tenants worked on the goods belonging to manufacturers, such manufacturers had an order or agreement or contract for the shipment of the goods when completed in interstate commerce. The only testimony concerning sale and shipments in interstate commerce by the manufacturers related to sale and shipments made after the goods had been received from the twelve ten-

Specification of Errors to be Urged

The Circuit Court of Appeals erred as follows:

(1) On the first two questions

(A) In holding that an action may be maintained under Section 16 (b) of the Act by an employee solely for the recovery of liquidated damages after such employee has been paid upon the *bona fide* settlement of a *bona fide* dispute between him and his employer as to coverage under the Act, all the overtime compensation claimed and to which he would have been entitled had he been within the protection of the Act during the entire period for which he claimed such compensation.

(B) In holding that such an action may be maintained solely for the recovery of liquidated damages under Section 16 (b) of the Act after such employee has been paid upon such settlement of such *bona fide* dispute an amount

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ants. There was no testimony by the tenants that they knew or had reason to believe that the goods worked on by them would be shipped in interstate commerce.

Included among the said twelve tenants were four tenants as to whom there was absolutely no evidence that they knew, either at the time of production or at any time thereafter, or upon the trial, that the goods worked on by them either were to be or were shipped in interstate commerce. These four tenants were Max Schneider (R. pp. 107-8); Benjamin Weinstein (R. 130-1); Raizen & Trager (R. 167-8); Schrader & Bazarnick (R. 176-7). The aggregate of the percentage of total space occupied by these four tenants during the years 1940 and 1941 was 6.91% (Deft's Ex. F, R. 336 B).

If the 6.91% is excluded from the Circuit Court's computation there would be no coverage for 1940, and if there were no coverage for 1940, the amount paid on the settlement as overtime compensation for the entire period in suit—October 24, 1938, to February 5, 1942, —is found to be slightly in excess of twice the overtime claimed for the remaining period involved—the whole of 1941 and January, 1942. Therefore, even if it be assumed that during 1941 and January, 1942, the employees were within the Act, and that the *bona fide* compromise and settlement is invalid, petitioner would not be liable in any event under Section 16(b) of the Act (Schedule A to Complaint, R. 6, as modified by Stipulation, R. 16, 18).

more than he would have been entitled to had he been within the protection of the Act during the entire period for which he claimed overtime compensation but less than the full amount of such overtime compensation plus the liquidated damages.

(C) In holding that an employee and an employer may not settle and compromise a *bona fide* dispute between them as to coverage under the Act where upon such settlement the employee is paid by the employer all the overtime compensation which the employee claims to be entitled to under the Act and in consideration thereof the employee releases the employer from all further claims under the Act, including the claim for liquidated damages under Section 16(b) of the Act.

(D) In holding that the release of all further claims under the Act, executed and delivered by the employee to his employer at the time he received all of the overtime compensation claimed by him under the Act upon the *bona fide* settlement of the *bona fide* dispute with his employer as to coverage under the Act, is not a good defense to an action subsequently brought by such employee solely to recover liquidated damages, under Section 16(b) of the Act.

(E) In failing to give effect to the well-established policy of the law to encourage the amicable adjustment of disputes by arm's length negotiation where the statutory purposes have been fully accomplished.

(2) On the third question—

(A) In holding that building maintenance employees were within the protection of the Act where it is shown only that the tenants of the building received, worked on and returned in intrastate commerce goods belonging to local owners who were not tenants of the building and

that subsequently some of the said goods were sold and shipped by such non-tenant owners in interstate commerce, there being no proof that at the time of production such tenants of the building had any knowledge of the ultimate destination of the goods worked on by them or that at the time of production the non-tenant owners had any prior orders or agreements to sell and ship any part of such goods in interstate commerce.

(B) In holding that under the circumstances recited in the foregoing paragraph the tenants of the building knew or had reasonable grounds to anticipate that such goods worked on by them would move into other States and that, therefore, they were engaged in the production of the goods for interstate commerce within the meaning of the Act.

Reasons Relied on for Granting the Writ

1. The Court below has decided important questions of Federal law which have not been, but should be, settled by this Court.

(A) The first two questions presented raise the precise issue which this Court expressly left undetermined in *Brooklyn Savings Bank* v. *O'Neil* and *Dize* v. *Maddrix*, 323 U. S. ——, 89 L. Ed. Ad. Op. 876, 886, namely, "what limitation, if any, §16 (b) of the Act places on the validity of agreements between an employer and employee to settle claims arising under the Act if the settlement is made as the result of a *bona fide* dispute between the two parties, in consideration of a *bona fide* compromise and settlement." The Court below has held that Section 16 (b) of the Act prohibits every such settlement if the dispute between the parties relates to coverage or, as the Court below stated it, "the law of the Act" (R. 325), even though the question of coverage under the Act presents what has been

described as "a molecular combination of fact and law which defies separation," *Berry* v. *34 Irving Place Corporation*, 52 Fed. Supp. 875, 881, and even if under the settlement the employee is paid all, or more than all, the overtime compensation he would have been entitled to had he been within the protection of the Act. There is no question of the *bona fides* of the dispute between the parties. The Court below itself has found that in the dispute between them each of the parties was partly right and partly wrong (R. 326). Neither is there any question of the *bona fides* of the settlement. It was made freely by the parties and only after respondent had communicated with the Wage and Hour Division and had consulted with and obtained the approval of an official of the union representing the employees (R. 25-6, 41).

The important consequences of the decision below to the vast number of employers and employees subject, or possibly subject, to the coverage of the Fair Labor Standards Act are apparent. Since no employer can, under the decision below, agree upon a settlement of a doubtful claim of liability under the Act without payment of an additional equal amount as liquidated damages, employees will in most of the doubtful cases of coverage be forced into the state and federal courts to litigate such questions to a final conclusion.

It is also important that the first two questions presented should be settled by this Court in order to clarify the confusion that has arisen because of this Court's recent approval, *per curiam*, of settlement stipulations in two cases pending before it after *certiorari* had been granted where the only questions presented dealt with coverage under the Act. *North Shore Corporation, Petitioner* v. *Barnett et al., id.* v. *Scott et al.*, 323 U. S. 679. The stipulations so approved by this Court provided that the employees should accept 66⅔% of the amounts of the judgments recovered by them below, said judgments being for minimum wages and overtime compensation found to

be due to the employees under Sections 6 and 7 of the Act and an equal amount as liquidated damages under Section 16(b) of the Act, *Overstreet et al. v. North Shore Corporation; Scott et al. v. id.*, 52 Fed. Supp. 503 (D. C. S. D. Florida); aff. *North Shore Corporation v. Barnett et al.*, 143 Fed. (2d) 172 (C. C. A. 5). It would seem that, if a controversy as to coverage under the Act could be settled while litigation is pending, it could be settled before suit was brought.

It is also important to the Administrator of the Act that the first two questions presented should be settled by this Court, because in extending coverage and resolving disputes as to coverage through proceedings instituted by the Administrator under the Act, employers could consent to coverage decrees in doubtful cases only upon pain of double liability. Here again, the result of the decision below is to open up the prospect of extensive litigation.

The decision below upon the first two questions presented also will have the result of reopening thousands of settlements involving millions of dollars, that heretofore have been made of borderline cases involving coverage under the Act. In his annual report for the fiscal year ended June 30, 1944, the Administrator states that in the five years and nine months that the Act then had been in force, about $70,000,000 in restitution of illegally withheld wages had been agreed to or ordered paid to almost 2,000,000 workers in about 90,000 establishments and that "several times this amount has probably been collected in addition over the period, through private action or *negotiation by employees and their unions* under a section of the Act which provides double penalty for failure to pay the minimum wage or time and a half overtime after 40 hours a week" (Emphasis ours). (Fair Labor Standards in Wartime, 3rd year, Annual Report, Wage and Hour and Public Contracts Divisions, U. S. Department of Labor, for the Fiscal Year Ended June 30, 1944, p. 10).

(B) The issue of coverage *presented* by the third question is also of great importance because it presents a situation unresolved by any of the prior decisions of this Court and affects many owners of multi-tenanted loft buildings and their maintenance employees. To date this Court has passed upon the question of coverage of such employees in three other common types of buildings:

(1) Where the tenants of a building are concededly engaged in manufacturing, selling and shipping of goods in interstate commerce. The maintenance employees of such a building are held to be covered by the Act because they have "such a close and immediate tie with the process of production" carried on by the tenants as to come within the Act. *Kirschbaum* v. *Walling*, 316 U. S. 517.

(2) Where the owner-occupant of the building is an interstate producer of goods and uses a substantial part of the building for its executive and administrative offices. Here, again, the building maintenance employees are covered by the Act because the offices are "part of an integrated effort for the production of goods" and such employees "stand in the same relation to production as did the maintenance workers in the A. B. Kirschbaum Co. case." *Borden Company* v. *Borella*, U. S. , 89 L. Ed. Ad. Op. 1240, 1243.

(3) Where substantial space in the building is used by numerous interstate producing concerns for their executive offices and sales agencies, such concerns being only tenants and not owners of the building. In such case, the employees are not covered by the Act because "running an office building as an entirely independent enterprise is too many steps removed from the physical process of the production of goods." *10 East Fortieth Street Building* v. *Callus*, U. S. , 89 L. Ed. Ad. Op. 1244, 1247.

In the building in the instant case the maintenance employees were several steps further removed from the

flow of goods in interstate commerce than were the maintenance employees in *Kirschbaum* v. *Walling*, *supra*, and in *Borden* v. *Borella*, *supra*. To hold that the building employees in the instant case came within the Act, removed as they were from the shipment in interstate commerce of the goods produced in the building, would, it is submitted, contravene the Congressional intent of the Act "* * * to leave local business to the protection of the states", *Walling* v. *Jacksonville Paper Co.*, 317 U. S. at 570 and "not to absorb by adjudication essentially local activities that Congress did not see fit to take over by legislation", *10 East Fortieth Street Building* v. *Callus*, U. S. , 89 L. Ed. Ad. Op. 1247.

The issue of coverage presented is also of great practical importance to the many owners and maintenance employees of multi-tenanted loft buildings in the heavily populated cities and states where goods produced by the industries in which the tenants of such buildings are engaged are consumed in great volume. As stated in the question presented, the tenant-contractors in such loft buildings are themselves not engaged in interstate commerce within the meaning of the Act. They neither receive goods from nor ship goods to other states. Their activities are wholly intrastate. Since the question as to whether the Act applies to the employees of a particular business is determined by the factual circumstances under which the particular business conducts its operations, *Kirschbaum* v. *Walling*, 316 U. S. 517; *Walling* v. *Jacksonville Paper Co.*, 317 U. S. 564, the determination of whether a particular business is engaged in the production of goods for commerce within the meaning of the Act cannot be made by an *industrial* classification of "subject" industries, unless the decision of this Court in *Warren-Bradshaw Drilling Co.* v. *Hall*, 317 U. S. 86, is to be interpreted to hold that if the proof establishes the "interstate character" of an industry, the employees of businesses closely identified with such an industry are automatically within the protection of the Act.

The holding by the Court below that the twelve additional tenants were interstate producers (R. 326) can be explained only upon the theory that the Court assumed that the proof established the interstate character of the New York City garment industry and that, therefore, the intentions, hopes or expectations of the non-tenant manufacturers to sell and ship their goods in interstate commerce were imputable to those of petitioner's tenants who were connected with the industry and in turn imputable to petitioner. But unlike the proof which established "the interstate character of the Texas oil industry," in *Warren-Bradshaw Drilling Co.* v. *Hall*, 317 U. S. 86, 89-92, the only evidence in the instant case touching upon the nature of the New York City garment industry was that petitioner's building is located in the garment district of New York City, that it regularly rented factory space to contractors in the garment industry and that some of the non-tenant manufacturers for whom the contractors rendered services eventually shipped some of their goods in interstate commerce.

Clearly, a decision based upon an assumption of the interstate character of a local industry rather than upon the proof usually required, that the individual employer "ships or expects to ship goods across state lines," *United States* v. *Darby*, 312 U. S. 100, 125, raises a question that should be settled by this Court.*

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* In this context the Wage and Hour Administrator has interpreted the Act as follows:

> "Employers are engaged in the production of goods 'for commerce' where the employer intends or hopes or has reason to believe that the goods or any unsegregated part of them will move in interstate commerce. If, however, the employer does not intend or hope or have any reason to believe that the goods in production will move in interstate commerce, the fact that the goods ultimately do move in interstate commerce would not bring employees engaged in the production of these goods within the purview of the Act. The facts at the time that the goods are being produced determine whether an employee is engaged

2. The decision below is in conflict with a decision of another Circuit Court of Appeals on the first two questions presented. In *Brooklyn Savings Bank* v. *O'Neil*, 323 U. S. ——, 89 L. Ed. Ad. Op. 876, 883 (footnote 21), this Court recognized that there is a conflict in the various Circuits over the right to compromise claims under the statute in cases involving *bona fide* disputes. Among the cases cited by this Court as indicating such conflict was *Atlantic Co.* v. *Broughton*, 146 Fed. (2d) 480 (C. C. A. 5); certiorari denied 323 U. S. ——, 89 L. Ed. Ad. Op. 1001, in which case, upon the cross-appeals, the Circuit Court of Appeals for the Fifth Circuit held that a claim for liquidated damages under Section 16 (b) of the Act could be extinguished upon an agreement of accord and satisfaction if such agreement followed upon a *bona fide* dispute.

The decision below is also in conflict with the views of the Circuit Court of Appeals for the Third Circuit as to what this Court decided in *Brooklyn Savings Bank* v. *O'Neil*, *supra*. In *Watkins et al.* v. *Hudson Coal Co.*, 8 Wage and Hour Reporter 918, —— Fed. (2d) —— (decided September 5, 1945) the Third Circuit Court of Appeals, in distinguishing between a waiver of overtime compensation concededly due under the Act and a settlement of a *bona fide* dispute, said:

> "It is now authoritatively settled that a waiver by an employee, even by a release under seal, of his rights against an employer under the Act is not effective to bar him from subsequent assertion of those rights. Brooklyn Dime (*sic*) Savings Bank v. O'Neil, and its companion cases, —— U. S. —— [WHR 401] (1945) decide this, as do the flock of well considered

in the production of goods for commerce and not any subsequent act of his employer or of some third party. Of course, the fact that the goods do move in interstate commerce is strong evidence that the employer intended, hoped or had reason to believe that the goods would move in interstate commerce." Wage and Hour Division, Release No. R-113, paragraph 2, December 2, 1938, revised November, 1939.

cases in the District Courts and Circuit Courts of Appeal. But in the Dime (*sic*) Bank decision the Court indicated that other considerations might apply if the sum paid by an employer to an employee was the 'result of the settlement of a bona fide dispute with respect to coverage or amount.' *The inference is that if there were, between employer and employee, a dispute either as to whether an employee was covered by the Act or, if so, how much he had coming to him by reasons of the provision of the Act, settlement between the two parties of their dispute may, under proper circumstances, be upheld.*" (Emphasis ours.)

3. The Court below has decided a Federal question of law in conflict with the applicable decisions of this Court and has departed so far from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision. The decision below, in dealing with the issues raised by the first two questions, constitutes a sharp departure from the generally accepted interpretation of those federal statutes which deal with the employer-employee relationship, that *bona fide* disputes of liability under such statutes may be compromised and settled. Although waivers of rights created under such statutes have been either expressly forbidden by Congress or prohibited by the courts, neither Congress nor the courts have refused to approve settlements of claims accruing under the statutes, where such settlements are arrived at by arm's-length negotiation between the parties and where no deception or coercion is placed upon the employee and the employee is fully apprised of his rights. Even a seaman who traditionally has been deemed a "ward of the admiralty" may release his claims under the federal statutes enacted for his protection (Seaman Act, 46 U.S.C., Secs. 597, 644; Jones Act, 46 U.S.C., Sec. 688) if such release is "executed freely without deception or coercion and * * * was made by the seaman with full

understanding of his rights." *Garrett* v. *Moore-McCormack Co.*, 317 U. S. 239. See, also, *The S. S. Standard*, 103 Fed. (2d) 437 (C. C. A. 2). Notwithstanding a provision in the Federal Employers' Liability Act (45 U.S.C., Sec. 55) prohibiting waivers of liability created under the Act, settlements of accrued claims under the Act have been upheld in this Court, *Mellon* v. *Goodyear*, 277 U. S. 335, *Flynn* v. *N. Y., N. H. & H. R. Co.*, 283 U. S. 53,* and in the State Courts, *Griffin* v. *N. Y., N. H. & H. R. Co.*, 279 Mass. 511, *Patton* v. *Atchison, T. & S. F. R. Co.*, 59 Okl. 155; *Ballenger* v. *Southern R. Co.*, 106 S. C. 200; *Lindsay* v. *Acme Cement Plaster Co.*, 220 Mich. 367. In the Longshoremen's and Harbor Workers' Compensation Act Congress expressly provided that employees may settle, subject to the approval of the Commission, claims for permanent total disability and for temporary partial disability (33 U.S.C., Secs. 908(c) 21; 908(i)).

The decisive consideration in interpreting the foregoing statutes has been the protection of the employee. *Brooklyn Savings Bank* v. *O'Neil*, 323 U. S. ——, 89 L. Ed. Ad. Op. 876, 885, and as indicated by the foregoing cases, the employees are completely protected by the shifting of the burden of proof where the employer sets up a release or a settlement agreement as a defense to the employee's action. Such burden was fully discharged by petitioner in the instant case. As the dissenting opinion below states:

> "Here there was no overreaching by anybody and if ever parties to a real dispute as to liability may finally settle their differences on the basis of a fair compromise duly carried out as agreed that was done

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* However, in *Duncan* v. *Thompson*, 315 U. S. 1, 7, this Court seems to have placed some doubt on these two cases by its statement that "we need not here determine what limitations, if any, 35 (45 U. S. C. Section 55) places upon the validity of agreements not to sue if made in consideration of a *bona fide* compromise and settlement of claims arising under the act."

in this case. As the district judge well said in his opinion, 'The plaintiffs had the option of bringing suit and taking the risk of recovering nothing or avoiding that risk by the acceptance of a compromise proposal.' It seems to me that enlightened public policy ought to permit employees, competently advised as to their rights, to have and to exercise such an option whenever they have the desire and opportunity to do so in cases where the controversy as to liability is based on substantial grounds. I cannot believe, until and unless authoritatively so advised, that they must be restricted to an 'all or nothing' gamble."

It is respectfully submitted that there is here presented a proper occasion for the exercise of the supervisory power of this Court.

D. A. SCHULTE, INC.,
Petitioner,

By EDWIN A. FALK,
ABRAHAM FRIEDMAN,
Counsel for Petitioner.

October 15, 1945.

APPENDIX

Pertinent provisions of the Fair Labor Standards Act of 1938 (Act of June 25, 1938, c. 676, 52 Stat. 1060; 29 U. S. C. §201 et seq.) read as follows:

Sec. 3(j). "Produced" means produced, manufactured, mined, handled, or in any other manner worked on in any State; and for the purposes of this Act an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any process or occupation necessary to the production thereof, in any State.

Sec. 7(a). No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerce or in the production of goods for commerce—

(1) for a workweek longer than forty-four hours during the first year from the effective date of this section,

(2) for a workweek longer than forty-two hours during the second year from such date, or

(3) for a workweek longer than forty hours after the expiration of the second year from such date,

unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

Sec. 16(b). Any employer who violates the provisions of section 6 or section 7 of this Act shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compen-

sation, as the case may be, and in an additional equal amount as liquidated damages. Action to recover such liability may be maintained in any court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated, or such employee or employees may designate an agent or representative to maintain such action for and in behalf of all employees similarly situated. The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action.

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IN THE

Supreme Court of the United States

October Term, 1945

No. 517

D. A. SCHULTE, INC.,

Petitioner,

against

SALVATORE GANGI, suing on behalf of himself and other employees similarly situated,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR PETITIONER

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BRIEF FOR PETITIONER

Opinions Below

The opinion of the District Court is reported at 53 Fed. Supp. 844 (R. 309-14).

The majority and dissenting opinions of the Circuit Court of Appeals are reported at 150 Fed. (2d) 694 (R. 322-328).

Jurisdiction

The decision of the Circuit Court of Appeals was rendered July 20, 1945. An order, upon stipulation of the parties, was made by the said Court staying the mandate until October 20, 1945, pending the filing of a petition for writ of certiorari.

Petition for writ of certiorari was filed October 17, 1945, and was granted November 19, 1945 (R. 340).

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, 28 U. S. C., Section 347 (a); 8 F. C. A., Title 28, Section 347 (a).

Questions Presented

The questions presented are:

1. Whether the Fair Labor Standards Act of 1938 (29 U. S. C., Section 201 *et seq.**) prohibits a *bona fide* settlement of claims for overtime compensation and statutory liquidated damages under Sections 7 (a) and 16 (b) of the Act (29 U. S. C., Sections 207 (a), 216 (b)) where the settlement is made as the result of a *bona fide* dispute between an employer and its employees with respect to coverage under the Act and the employees are paid under the settlement all the overtime compensation to which they would have been entitled had they been within the protection of the Act.

2. Whether the employees may recover statutory liquidated damages and counsel fees under Section 16 (b) of the Act under a claim for non-payment of overtime under Section 7 (a) of the Act, where it is found in a suit for such damages and counsel fees instituted

* C. 676, 52 Stat. 1060, hereinafter referred to as the "Act."

after such *bona fide* settlement, that the employees were not entitled to all the overtime compensation claimed and received by them because during a substantial part of the period for which they made such claim they were not within the protection of the Act.

If the answers to the foregoing questions are in the affirmative, then

3. Whether building maintenance employees are within the protection of the Act if the facts relied on to establish coverage of the employees show only that some of the tenants in the building receive, work on and return in intrastate commerce goods belonging to local owners who are not tenants of the building and that subsequently some of the said goods are sold and shipped by such non-tenant owners in interstate commerce, there being no proof either that at the time of production such tenants had any knowledge of the ultimate destination of the goods worked on by them, or that at the time of production the non-tenant owners had any prior orders or agreements to sell and ship any part of the completed goods in interstate commerce.

Statute Involved

Pertinent provisions of the Fair Labor Standards Act of 1938 (52 Stat. 1060, 29 U. S. C., Section 201 *et seq.*) are set out in Appendix A annexed to this Brief.

The Facts

A. As to the Two Settlement Questions Presented: In June, 1942, shortly after this Court held in *Kirschbaum* v. *Walling*, 316 U. S. 517, that the Fair Labor Standards Act of 1938 applied to maintenance employees of buildings where concededly the tenants were engaged in pro-

ducing goods for interstate commerce, the respondents, who were maintenance employees at petitioner's twenty-three story loft building at 571-583 Eighth Avenue, New York City, demanded through their union representatives that petitioner pay them overtime compensation in accordance with Section 7 of the Act for all *time worked* by them from October 24, 1938, the effective date of the Act, to February 5, 1942, in excess of the hours prescribed in Section 7 (a) of the Act. At the same time respondents demanded that petitioner pay sums equal to such claimed overtime as liquidated damages under Section 16 (b) of the Act (R. 29, 39, 276). Petitioner denied liability on the ground that the tenants in its building were principally garment contractors who performed labor only for New York manufacturers and made no interstate sales or shipments of goods (R. 274-5). Respondents having threatened suit (R. 29, 276-7), the petitioner, in September, 1942, offered to compromise and settle the dispute by paying all the overtime compensation to which respondents would have been entitled had they been within the protection of the Act since October 24, 1938, but without the liquidated damages (R. 34, 278). After considering the offer and consulting with the local Wage and Hour Administrator's office and an official of their union (R. 25-6, 41) respondents accepted the offer (R. 34-37, 278). Petitioner thereupon made payment as agreed and received from each of the respondents his duly executed release of all further claims under the Act (R. 279-281).

Several months later respondent Gangi, who, as the union representative of all the respondents, negotiated the above settlement, instituted this suit solely for liquidated damages and counsel fees.

After trial without a jury the District Court found (R. 312):

> "* * * that there was a genuine dispute between the parties pertaining to a claim for compensation for a period long past; that the parties, negotiating

at arm's length, and without mistake, fraud or misrepresentation, on either part and without overreaching, reached an accord and an agreement for the settlement of their dispute; that the amount agreed upon was an amount equal to the overtime compensation that would be payable if the Act applied without liquidated damages, and that such amount was received by the plaintiffs in satisfaction of the claim; that to evidence that transaction the plaintiffs executed and delivered to the defendant releases under seal and that such accord and satisfaction and release should be given effect unless the statute forbids."

Holding that neither the Act nor the public policy underlying the Act prohibits such a *bona fide* settlement, the District Court accordingly sustained petitioner's defenses of accord and satisfaction and release, and dismissed the complaint (R. 314).

The Circuit Court of Appeals reversed (R. 322-6), Judge Chase dissenting (R. 327-8), and held (1) that the Act prohibits the *bona fide* settlement of a genuine dispute as to coverage under the Act, and (2) that the proof offered by respondents established that petitioner was liable under the Act for at least "a part of the period involved" (R. 325).

B. As to the Coverage Question Presented: The aforesaid second ground of reversal by the Circuit Court of Appeals raises the issue presented by the third question of the writ herein, namely, that of the sufficiency of proof to establish coverage. The proof on this issue was as follows:

Petitioner's building had 150,000 square feet of rentable space, which was occupied by more than ninety tenants during the period involved in the suit (Plaintiff's Exhibit 1, R. 329-332; Defendant's Exhibit F, R. 336B). These tenant-contractors worked on materials delivered to them which were owned by so-called garment manu-

facturers who had their offices, showrooms and shipping rooms elsewhere in New York City. After completing their services—sewing or stitching, pleating and trimming or fabricating accessories—the tenant-contractors returned the materials to the local manufacturers, who either had other contractors finish the goods into completed garments, or, if they were completed by the tenants, exhibited and sold them at wholesale, along with other garments worked on by other contractors who were not tenants of petitioner's building. A number of petitioner's tenants worked for several such local manufacturers, while practically all of the manufacturers had several other contractors, not tenants of the building, working on their goods.

Thus, the only relationship of the tenants in petitioner's building to the manufacturers who owned the materials and sold the completed garments was that of true independent contractors, who performed specific production operations in the manufacture of garments from the manufacturers' materials. Proof was made upon the trial that ultimately some of the garments worked on by the tenant-contractors were sold and shipped by the owner-manufacturers in interstate commerce.

The District Court stated that "by a generous appraisal of the testimony," in 1939 7.7% of the space in the building was occupied by eight tenants engaged in the production of goods for interstate commerce; in 1940, 8.2% of the space was occupied by such tenants; and in 1941, 10.3% of the space was occupied by such tenants (R. 314, footnote 1). Upon the consent of both parties the Circuit Court of Appeals treated these facts as findings of the District Court (R. 326).

In November, 1943, the Administrator of the Act adopted a standard of 20% of space occupancy for determining whether a substantial portion of a building is devoted to production of goods for interstate commerce, for

the purpose of bringing building maintenance employees within the Act (Wage and Hour Division Release No. PR-19 [rev.], November 19, 1943). The Circuit Court of Appeals accepted that standard in the case at bar (R. 325-6). Upon the figures as found by the District Court, the respondents were not under coverage of the Act at any time within the period in suit.

In the Circuit Court of Appeals respondents urged, however, that the District Court erred in excluding from its computations for 1940, 1941 and January, 1942,—twenty-five months of the thirty-nine months involved in the suit—the percentages of space occupied by an additional twelv tenants, who were claimed by respondents also to have been engaged in the production of goods for interstate commerce.* The Circuit Court of Appeals held that "the testimony clearly shows that at the time of production these tenants had at the very least reasonable grounds to anticipate that their products would move in other states" (R. 326). Adding the percentages of space occupied by these tenants to the District Court's percentages, the Circuit Court concluded that the total percentage of space occupied by interstate producers in petitioner's building in 1940, 1941, and January, 1942, was in excess of 20% of the total area in the building and "therefore appellants have shown that they were covered by the Act" (R. 326). The sole basis in the record for this finding is that the manufacturers for whom the said twelve tenant-contractors worked eventually disposed of some of their goods in interstate commerce. No evidence was

* These twelve tenants were Levy-Blum & Goldschmidt Corp. (R. 64-76); Ansonia Frocks (R. 88-93); Abraham Kaufman (R. 100-107); Raizen & Trager (R. 167-8); Vincent Gamberdini (R. 169-176); Schrader & Bazarnick (R. 176-177); Maurice Steindl (R. 178-188); Benjamin Weinstein (R. 130-132); Max Yuni (R. 133-136); Max Schneider (R. 107-108); Samuel Sunshine (R. 81-88) and Columbia Belt Co. (R. 108-123 and R. 155-158). All the foregoing are referred to herein as contractors, although the first mentioned actually was a manufacturer, with offices, salesroom and shipping rooms elsewhere in New York City.

offered and no attempt was made to prove that at the time when any of the additional twelve tenants worked on goods belonging to the manufacturers, such manufacturers had an order or an agreement or contract for the shipment of the goods, when completed, in interstate commerce. There was no testimony by any of the twelve tenants that they knew or had reason to believe that the goods worked on by them would be shipped in interstate commerce. In fact, there was no evidence, in the case of four of the twelve tenants, that any of them knew, either at the time of production or at any time thereafter, or even upon the trial, that the goods worked on by them were eventually shipped in interstate commerce. These four tenants were Max Schneider (R. 107-8); Benjamin Weinstein (R. 130-2), Raizen & Trager (R. 166-8) and Schrader & Bazarnick (R. 176-7). If the Court below erred in including these four tenants as being interstate producers under the Act, then respondents have no claim against petitioner even if the Act forbids the *bona fide* settlement of a *bona fide* dispute, and even if the Court was correct in finding the other eight tenants to be interstate producers. This appears from the following:

These four tenants occupied 10,500 sq. ft. of the entire 150,000 sq. ft. of rentable area in the building. The aggregate percentage of the total space occupied by these four tenants during the years 1940, 1941 and January 1942, was 7% (as computed from Defendant's Exhibit F, R. 336B). If the said 7% is excluded from the Circuit Court's computation, there would be no coverage for 1940, because the total percentage of space in petitioner's building occupied by interstate producers would be less than 20%. If there was no coverage for 1940, the amount paid on the settlement as overtime compensation for the entire period in suit—October 24, 1938, to February 5, 1942,—is found to be slightly in excess of twice the overtime due for the whole of 1941 and January, 1942. Thus, even if it be assumed that during 1941 and January,

1942, the respondents were within the Act, and that the *bona fide* settlement is invalid, petitioner would not be liable in any event under Section 16 (b) of the Act (Schedule A to the complaint, R. 6, as modified by stipulation, R. 16-18).

Because of the key position occupied by these four tenants, we briefly summarize their testimony in Appendix B, pages 27-8 of this Brief.

No attempt was made by respondents to prove that the manufacturers ever advised the tenants that the goods were to be shipped outside New York. There was no attempt to prove that any of the tenants were put on notice that the goods worked on by them during the period involved in the suit would be shipped outside New York. The only conceivable basis upon which the Court could have made its finding that the additional twelve tenants "had at the very least reasonable grounds to anticipate that their products would move in other states" was upon the theory that, since petitioner's building was located in what the Court below describes as "the garment district of New York City," the tenants were on notice that the goods worked on in petitioner's building would be shipped in interstate commerce. But there was no proof offered that the garment industry in New York City was of such an interstate character that specific proof concerning the activities of individual tenants in petitioner's building was unnecessary in order to fix liability upon petitioner under the Act.

Specification of Errors

The Circuit Court of Appeals erred as follows:

(1) On the first two questions:

(A) In holding that an action may be maintained under Section 16 (b) of the Act by an employee solely for the recovery of liquidated damages after such employee has

been paid upon the *bona fide* settlement of a *bona fide* dispute between him and his employer as to coverage under the Act, all the overtime compensation claimed and to which he would have been entitled had he been within the protection of the Act during the entire period for which he claimed such compensation.

(B) In holding that such an action may be maintained solely for the recovery of liquidated damages under Section 16 (b) of the Act after such employee has been paid upon such settlement of such *bona fide* dispute an amount more than he would have been entitled to had he been within the protection of the Act during the entire period for which he claimed overtime compensation but less than the full amount of such overtime compensation plus the liquidated damages.

(C) In holding that an employee and an employer may not settle and compromise a *bona fide* dispute between them as to coverage under the Act where upon such settlement the employee is paid by the employer all the overtime compensation which the employee claims to be entitled to under the Act and in consideration thereof the employee releases the employer from all further claims under the Act, including the claim for liquidated damages under Section 16(b) of the Act.

(D) In holding that the release of all further claims under the Act, executed and delivered by the employee to his employer at the time he received all of the overtime compensation claimed by him under the Act upon the *bona fide* settlement of the *bona fide* dispute with his employer as to coverage under the Act, is not a good defense to an action subsequently brought by such employee solely to recover liquidated damages, under Section 16(b) of the Act.

(E) In failing to give effect to the well-established policy of the law to encourage the amicable adjustment of disputes by arm's length negotiation where the statutory purposes have been fully accomplished.

(2) On the third question—

(A) In holding that building maintenance employees were within the protection of the Act where it is shown only that the tenants of the building received, worked on and returned in intrastate commerce goods belonging to local owners who were not tenants of the building and that subsequently some of the said goods were sold and shipped by such non-tenant owners in interstate commerce, there being no proof that at the time of production such tenants of the building had any knowledge of the ultimate destination of the goods worked on by them or that at the time of production the non-tenant owners had any prior orders or agreements to sell and ship any part of such goods in interstate commerce.

(B) In holding that under the circumstances recited in the foregoing paragraph the tenants of the building knew or had reasonable grounds to anticipate that such goods worked on by them would move into other States and that, therefore, they were engaged in the production of the goods for interstate commerce within the meaning of the Act.

SUMMARY OF ARGUMENT

The holding of the Circuit Court of Appeals that the public policy underlying the Act forbids the compromise and settlement of a *bona fide* dispute as to coverage rests upon a misapprehension of this Court's decision in *Brooklyn Savings Bank* v. *O'Neil* and *Dize* v. *Maddrix*, 324 U. S. 697. The interests of employers, employees and the pub-

lic require adherence to the rule established in cases under other federal statutes dealing with the employer-employee relationship, that a *bona fide* settlement should not be invalidated if the employer shows that the dispute leading to the settlement was *bona fide* and that the settlement was arrived at freely and without fraud or coercion and that at the time of the settlement the employee was fully apprised of his rights. (Point I.)

Respondents did not sustain their burden of establishing petitioner's liability under Section 7(a) of the Act, the proof having failed to establish that tenants occupying 20% or more of the space in petitioner's building were interstate producers within the meaning of the Act. (Point II.)

ARGUMENT

POINT I

Neither by its text nor by its underlying policy does the Act prohibit the compromise and settlement of a *bona fide* dispute between an employer and an employee as to the employer's liability under Section 7(a) of the Act.

In *Brooklyn Savings Bank* v. *O'Neil*, *supra*, this Court held that, in the absence of a *bona fide* dispute between an employer and an employee as to liability under Section 7 (a) of the Act, an employee's release of his right to liquidated damages under Section 16 (b) was invalid and does not bar a subsequent action to recover such liquidated damages. The ground of this Court's holding in that case was that such a release was "a mere waiver, no different from a waiver by an employee of his right to the basic statutory minimum wage or overtime wages payable under the Act" and that to allow such a waiver would nullify the purposes of the Act.

In *Dize* v. *Maddrix*, 324 U. S. 697 (a companion case of *Brooklyn Savings Bank* v. *O'Neil*, *supra*), this Court held absolutely void a release and waiver of liquidated damages under Section 16 (b) of the Act given by an employee to an employer when both parties knew at the time the combined waiver and release was given that more than the amount paid to the employee was due him as minimum statutory wages under the Act. The ground of the decision in the *Dize* case was that "the employer and employee attempted by means of that release to waive the right to the basic statutory minimum wages as well as the right to liquidated damages" and that such a waiver would nullify the purposes of the Act.

In its decision in the foregoing cases this Court, however, expressly reserved determination of the question of the validity of an agreement between an employer and an employee "to settle claims arising under the Act if the settlement is made as the result of a *bona fide* dispute between the two parties, in consideration of a *bona fide* compromise and settlement. Neither of the above mentioned cases presented such issues for our consideration." (324 U. S. 714.)

The case at bar presents the issue thus reserved by this Court. The District Court held in this case that neither the Act nor the policy underlying the Act forbids such a *bona fide* settlement. The Circuit Court of Appeals, Judge Chase dissenting, reversed the District Court and held that the Act forbids the *bona fide* settlement of a dispute between an employer and an employee where the dispute is as to the basic liability of the employer under Section 7 of the Act even though in the dispute between the parties the Circuit Court found that each of them was partly right and partly wrong as to the employer's basic liability (R. 326).

The opinion of the Circuit Court of Appeals proceeds upon four erroneous assumptions. These are:

First: That the facts in this case are "exactly the same as those" in *Brooklyn Savings Bank* v. *O'Neil*, *supra*. (R. 325.) This is not so as the following quotation from this Court's opinion in that case shows (324 U. S. 703):

> "We think the record in this case shows that the release was not given in settlement of a *bona fide* dispute between employer and employee. * * * With the exception of the recital in the release, there is nothing in the record which shows that the respondent's release was obtained as the result of the settlement of a *bona fide* dispute between the parties with respect to coverage or amount."

Second: Despite this Court's repeated reference to the fact that the questions in *Brooklyn Savings Bank* v. *O'Neil* and *Dize* v. *Maddrix*, *supra*, did not involve "a *bona fide* dispute between the parties as to coverage or amount", the Circuit Court erroneously assumed that the question reserved by this Court in the *O'Neil* case was confined to a "genuine dispute, not as to the law of the Act, but as to facts, such as the amount of labor actually performed" (R. 325). This erroneous assumption gave rise to the Circuit Court's misapprehension that this Court had passed upon the point in issue in this case (R. 325).

Third: The Circuit Court's third erroneous assumption is that the liability under Sec. 7 of the Act and the liquidated damages under Sec. 16 (b) of the Act constitute "a single and entire liability" which under no circumstances may be compromised. In *Overnight Transportation Co.* v. *Missel*, 316 U. S. 572, this Court held that the liquidated damages to which an employee is entitled under Section 16 (b) of the Act constitute compensation for de-

lay of payment of sums due under the Act. While this Court held in that case that the liability for such liquidated damages was mandatory regardless of the good faith of an employer or the reasonableness of his belief that no overtime compensation was owed by him to his employees, it did not hold that *therefore* a *bona fide* dispute between the parties as to whether overtime compensation was payable under the Act could not be compromised and settled. The statement from its prior decision in *Rigopolous* v. *Kervan*, 140 Fed. (2d) 506, 507, quoted by the Circuit Court of Appeals in its opinion herein, that the employer's liability for unpaid overtime compensation and liquidated damages under Section 16 (b) "is a single and entire liability" which is "not discharged in toto by paying one-half of it" is correct only as it applies to cases such as *Brooklyn Savings Bank* v. *O'Neil*, *supra*, where there has been no *bona fide* dispute as to liability or to cases where the parties—employer and employee—enter into an agreement to circumvent the provisions of Sections 6 or 7 of the Act.

Such language clearly does not apply to a case where the liability under the Act is, in good faith, the point in issue.

When the dispute arose between the parties in the case at bar, the respondents asserted two claims, one for overtime compensation under Section 7 of the Act and the other for an equal amount as liquidated damages under Section 16 (b) of the Act (R. 29, 39, 276). The dispute involved the basic liability for either of said amounts. As the litigation in the case at bar has established, the dispute was so well-founded that the two courts below have disagreed as to the correct answer to the question of basic liability. Even the Circuit Court has sustained in substantial part (for the 14 months prior to Jan. 1, 1940) petitioner's denial of liability. Under such circum-

stances the payment of the amount claimed as overtime compensation was sufficient consideration for the release of the claim for the liquidated damages.

Chicago, Milwaukee & St. Paul R. Co. v. *Clark*, 178 U. S. 353;
Bofinger v. *Tuyes*, 120 U. S. 198;
Schuttinger v. *Woodruff*, 259 N. Y. 212;
Jaffray v. *Davis*, 124 N. Y. 164;
Schnell v. *Perlmon*, 238 N. Y. 362;
Nassoiy v. *Tomlinson*, 148 N. Y. 326.

Fourth: The final assumption made by the Circuit Court of Appeals is that to approve a *bona fide* settlement of a *bona fide* dispute, such as is presented by this case, would make it possible for employers to evade the Act. This assumption overlooks the fact that when an employer pleads a release in a case under a federal statute enacted for the benefit of employees, the employer has the burden of proving that the release was supported by adequate consideration; was procured as a result of arm's-length negotiation free from coercion and deception and that the employee was fully apprised of his rights. All of these conditions were met and have been found in the case at bar (R. 312-3).

Even a seaman who traditionally has been deemed a "ward of the admiralty" may release his claims under the statutes enacted for his protection (Seaman Act, 46 U. S. C., Sections 597, 644; Jones Act, 46 U. S. C., Section 688) if such release is "executed freely without deception or coercion and * * * was made by the seaman with full understanding of his rights." *Garrett* v. *Moore-McCormack Co.*, 317 U. S. 239. The Court below, in *The S. S. Standard*, 103 Fed. (2d) 437 (C. C. A. 2), itself had occasion to apply this rule in a case where the issue presented was as to the binding force of a general release executed by an injured seaman of all claims which he

had or might have against his employer. The District Court had held that the seaman could not give away or release his right to maintenance and cure. However, the Circuit Court of Appeals held that (103 Fed. (2) 439) "a release fairly entered into and fairly safeguarding the rights of the seaman should be sustained. Any other result would be no kindness to the seaman, for it would make all settlements dangerous from the employer's standpoint and thus tend to force the seaman more regularly into the courts of admiralty."

It may fairly be said that in the case at bar as in the above case, it "would be no kindness" to the employee to forbid absolutely all *bona fide* settlements under the Act because had respondents been given no alternative to litigation they might not have recovered what petitioner voluntarily paid them on the settlement. That such is not a remote possibility is suggested by the fact that the computation of the settlement in the case at bar was based upon a substantially longer period of time—thirty-nine months—than the Circuit Court of Appeals fixed as the period of petitioner's liability—twenty-five months.

Notwithstanding a provision in the Federal Employers' Liability Act (45 U. S. C., Section 55) prohibiting waivers of liability created under the Act, settlements of accrued claims under the Act have been upheld in this Court, *Mellon* v. *Goodyear*, 277 U. S. 335, *Flynn* v. *N. Y., N. H. & H. R. Co.*, 283 U. S. 53, and in the State courts, *Griffin* v. *N. Y., N. H. & H. R. Co.*, 279 Mass. 511, *Patton* v. *Atchison, T. & S. F. R. Co.*, 59 Okl. 155; *Ballenger* v. *Southern R. Co.*, 106 S. C. 200; *Lindsay* v. *Acme Cement Plaster Co.*, 220 Mich. 367.

The decisive consideration in interpreting the foregoing statutes has been the protection of the employee, *Brooklyn Savings Bank* v. *O'Neil*, 324 U. S. 697, and as indicated by the foregoing cases, the employees are completely protected by the shifting of the burden of

proof where the employer sets up a release or a settlement agreement as a defense to the employee's action. Such burden was fully discharged by petitioner in the instant case.*

Under the holding of the Circuit Court of Appeals in this case an employer must, no matter how well-founded his claim may be that he is not or was not subject to the provisions of the Act, either concede his past or present liability under the Act and pay the full amount of the compensation claimed by his employees, plus an additional sum as liquidated damages, or stand upon his denial of liability and force his employees to institute suit to a final judicial determination of the disputed question of liability. In many borderline cases such a course would obviously result in a disruption of amicable employer-employee relationships, and compel employees to risk more by suit than they might procure in settlement and compel litigiousness where the general policy of the law is to encourage adjustment.

By the holding below, thousands of settlements of disputed liability under the Act which have been heretofore made between employers and employees involving tens

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* The dissenting opinion below states (R. 327-8):

"Here there was no overreaching by anybody and if ever parties to a real dispute as to liability may finally settle their differences on the basis of a fair compromise duly carried out as agreed that was done in this case. As the district judge well said in his opinion, 'The plaintiffs had the option of bringing suit and taking the risk of recovering nothing or avoiding that risk by the acceptance of a compromise proposal.' It seems to me that enlightened public policy ought to permit employees, competently advised as to their rights, to have and to exercise such an option whenever they have the desire and opportunity to do so in cases where the controversy as to liability is based on substantial grounds. I cannot believe, until and unless authoritatively so advised, that they must be restricted to an 'all or nothing' gamble."

of millions of dollars have been put in peril and are subject to being reopened by further demands and suits.*

Furthermore, it would appear under the holding below that at no intermediate stage of litigation as to liability under the Act may the suit be settled by payment of less than the sums claimed by the employees, including the liquidated damages and counsel fees.†

Such a sharp departure from the generally accepted interpretation of similar federal statutes should only be made when the Congressional intent is clear and unequivocal. As this Court recently said in another but somewhat similar situation,

> "If Congress had intended to make such a drastic departure from the traditions of equity practice, an unequivocal statement of its purpose would have been made." *Hecht Co.* v. *Bowles*, 321 U. S. 321, 329.

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* In his annual report for the fiscal year ended June 30, 1944, the Administrator of the Act states that in the five years and nine months that the Act had then been in force, about $[illegible] in restitution of illegally withheld wages had been agreed to or ordered paid to about 2,[illegible] workers in and about [illegible] establishments and that "several times this amount has probably been collected in addition over the period, through private actions or negotiation by employees and their unions under a section of the Act which provides double penalty for failure to pay the minimum wage or time and a half for overtime after 40 hours a week" (emphasis ours). (Fair Labor Standards Act, Martin's 3rd year, Annual Report, Wage and Hour and Public Contracts Divisions, U. S. Department of Labor, for the Fiscal Year Ended June 30, 1944, p. 20.)

† Such settlements are not unusual. *Cf. North Shore Corporation, Petitioner* v. *Barnett et al.*, *id.* v. *Scott et al.*, 323 U. S. 679, where this Court at its last Term, approved, *per curiam*, stipulations of settlement in two cases pending before it after certiorari had been granted where the only questions presented dealt with basic liability coverage under the Act. The stipulations so approved by this Court provided that the employees should accept [illegible]% of the amounts of the judgments recovered by them below for minimum wages and overtime compensation found to be due them under Secs. 6 and 7 of the Act together with an equal amount as liquidated damages under Sec. 16(b) of the Act. *Overstreet et al.* v. *North Shore Corp.*; *Scott et al.* v. *id.*, 52 Fed. Supp. 503 (D. C. S. D. Florida), affd., *North Shore Corp.* v. *Barnett et al.*, 143 Fed. (2) 172, 595 (C. C. A. 5th).

POINT II

Assuming, without conceding, that the settlement and releases are invalid, petitioner nevertheless is not liable because respondents failed to establish coverage under the Act.

The burden of establishing petitioner's liability under the Act rested upon respondents. *Warren-Bradshaw Drilling Co.* v. *Hall*, 317 U. S. 88, 90.

To establish coverage it was incumbent upon respondents, building maintenance employees, to prove that tenants occupying more than 20% of the space in the building intended or expected "at the time of production" that the goods worked on by them would move in interstate commerce. This 20% standard for building maintenance employees was established by the Wage and Hour Administrator (Wage and Hour Division Release No. PR-19 [rev.] Nov. 19, 1943) and upon the argument of the appeal below was accepted by both parties herein. Such standard was adopted by the Circuit Court in its opinion in this case (R. 325).

In *United States* v. *Darby*, 312 U. S. 100, 118, this Court construed the phrase "production for commerce" used in Section 7 of the Act as meaning "at least production of goods, which, at the time of production, the employer, according to the normal course of his business, intends or expects to move in interstate commerce although, through the exigencies of the business, all of the goods may not thereafter actually enter interstate commerce."*

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* In its opinion in *United States* v. *Darby*, *supra*, this Court referred to the opinion of the Wage and Hour Administrator as to the coverage provisions of the Act in his Interpretative Bulletin No. 5 (1940 Wage and Hour Manual, pp. 131 *et seq.*, Wage and Hour

Upon the proof offered by respondents, the District Court found that at no time during the period in suit was more than 10.3% of the space in the building occupied by tenants producing goods for interstate commerce (R. 314, footnote 1). This percentage was less than the said 20% standard of occupancy.

The Circuit Court held, however, that the space occupied by twelve additional tenants in petitioner's building should be added to the District Court's computations because "at the time of production these tenants had at the very least reasonable grounds to anticipate that their products would move in other States" (R. 326). Adding the percentage of space occupied by the twelve additional tenants to the District Court's percentages, the Circuit Court found coverage for the last twenty-five months of the thirty-nine months' period involved in suit and it found no coverage for the first fourteen months of the period in suit (R. 326).

Division Release R.—113; Dec., 1938, Revised Nov., 1939). Paragraph 2 of the said Bulletin reads as follows:

> "Employers are engaged in the production of goods 'for commerce' where the employer intends or hopes or has reason to believe that the goods or any unsegregated part of them will move in interstate commerce. *If, however, the employer does not intend or hope or have any reason to believe that the goods in production will move in interstate commerce, the fact that the goods ultimately do move in interstate commerce would not bring employees engaged in the production of these goods within the purview of the Act. The facts at the time that the goods are being produced determine whether an employee is engaged in the production of goods for commerce and not any subsequent act of his employer or of some third party.* Of course, the fact that the goods do move in interstate commerce is strong evidence that the employer intended, hoped or had reason to believe that the goods would move in interstate commerce." (Italics ours.)

Although, as this Court stated in *Skidmore* v. *Swift*, 323 U. S. 134, the rulings, interpretations and opinions of the Administrator are not controlling on the courts, nevertheless they "do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance."

The issue, therefore, as to coverage comes down to whether or not the additional twelve tenants were properly found to be interstate producers within the meaning of the Act. The sole basis in the record for the finding by the Circuit Court that these additional twelve tenants had "at the very least reasonable grounds to anticipate that their products would move in other States" was that some of the goods worked on by these tenants were, as it turned out, eventually disposed of in interstate commerce by the owner-manufacturers thereof. As has been shown in our discussion of the facts relating to coverage (pp. 7-9, *supra*), no evidence was offered and no attempt was made to prove that, at the times when any of the additional twelve tenants worked on the goods belonging to the manufacturers, such manufacturers had an order or contract for the shipment of the goods when completed in interstate commerce (*cf. Walling* v. *Jacksonville Paper Co.*, 317 U. S. 564, 569). There was no proof that any of the twelve tenants knew or had reason to believe that the goods worked on by them would be shipped in interstate commerce. The respondents made no attempt to prove that the manufacturers ever had advised the tenants that the goods were to be shipped to points outside of New York State and there was no attempt to prove that any of the tenants had been put on notice that the goods worked on by them were to be shipped outside of New York State.

Therefore, under the foregoing tests of coverage, the respondents were not within the Act.

In point of fact, as is shown in Appendix B, pages 27 s. *infra*, there was no proof in the case of four of the twelve tenants that any of them knew, *even at the time of the trial*, that any of the goods worked on by them had been shipped in interstate commerce, even though under the foregoing tests of coverage such subsequent development would have been irrelevant.

As has been stated at pp. 8-9, *supra*, if the space occupied by the said four tenants—7% —is excluded from the Circuit Court's computation, there would be no coverage for 1940 because the total percentage of space in petitioner's building then occupied by interstate producers would be less than the 20% standard. And if there was no coverage for 1940 and the *bona fide* settlement is held to be invalid, petitioner still would not be liable under Section 16 (b) of the Act, because the amount paid on the settlement as straight overtime compensation for the entire period in suit—October 24, 1938, to February 5, 1942,—is slightly in excess of the overtime due for 1941 and January, 1942 plus an equal amount as liquidated damages under Section 16(b). (Schedule A to complaint, R. 6, as modified by Stipulation, R. 16, 18).

The Circuit Court finding that the additional twelve tenants had "at the very least reasonable grounds to anticipate that their products would move in other States" must have been based upon the theory that, since petitioner's building was located in what it describes as "the garment district of New York City" (R. 325), the interstate character of the garment industry of New York City was established and that, therefore, the tenants were on notice that goods they worked on would be shipped in interstate commerce.

This theory finds no support either on the face of the Act or in the decisions of this Court or in the interpretation placed upon the Act by the Wage and Hour Administrator.

The Act itself does not provide for an industrial classification of industries as the test of coverage.

In *Kirschbaum* v. *Walling*, 316 U. S. 517, and *10 East Fortieth Street Building* v. *Callus*, 325 U. S. 578, this Court held that the question as to whether or not building maintenance employees are within the Act depends in each case upon the question whether or not their activities are within the area of commerce in which Congress

saw fit to regulate when it enacted the Act. Therefore, Section 3 (j) of the Act, which defines employees within the coverage of the Act to be those who are engaged "in any process or occupation necessary to the production of goods" for commerce, requires "an inquiry into the relationship of the particular employees to the production of goods for commerce" (*Kirschbaum* v. *Walling*, 316 U. S. 517, 525).

In *Walling* v. *Jacksonville Paper Co.*, 317 U. S. 564, 572, this Court stated:

> "The applicability of the Act is dependent upon the character of the employees' work. * * * Here as in other situations the question of the Act's coverage depends on the special facts pertaining to the particular business."

In the Annual Report of the Wage and Hour Division for the Fiscal Year Ended June 30, 1944, the Administrator of the Act, after pointing out (pp. 8-9) that "coverage under the Act is not itself as broad as the Federal power," with the result that "employees protected by the Act and others unprotected may work side by side at similar tasks in the same plant," suggests that the problem thus presented could be met by changing the test of coverage "to an industry basis making the minimum wage and maximum hour provisions applicable to all employment in industries found by the Administrator substantially to affect interstate commerce."

However, as the Administrator points out, this is a question for Congress and not for the courts to decide.

Conclusion

The decision below is erroneous and should be reversed.

Respectfully submitted,

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Appendix A

Pertinent provisions of the Fair Labor Standards Act of 1938 (Act of June 25, 1938, c. 676, 52 Stat. 1060; 29 U. S. C. §201 et seq.) read as follows:

Sec. 3(j). "Produced" means produced, manufactured, mined, handled, or in any other manner worked on in any State; and for the purposes of this Act an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any process or occupation necessary to the production thereof, in any State.

Sec. 7(a). No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerce or in the production of goods for commerce—

(1) for a workweek longer than forty-four hours during the first year from the effective date of this section,

(2) for a workweek longer than forty-two hours during the second year from such date, or

(3) for a workweek longer than forty hours after the expiration of the second year from such date,

unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

Sec. 16(b). Any employer who violates the provisions of section 6 or section 7 of this Act shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compen-

sation, as the case may be, and in an additional equal amount as liquidated damages. Action to recover such liability may be maintained in any court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated, or such employee or employees may designate an agent or representative to maintain such action for and in behalf of all employees similarly situated. The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action.

Appendix B

Max Schneider (R. 107-8) — Mr. Schneider occupied 1,900 square feet on the sixteenth floor of petitioner's building during the entire period in suit (R. 107, 336B). He was a dress contractor and contracted exclusively for C. H. D. Robbins Company of 525 Seventh Avenue, New York City, a manufacturer. The following is the only testimony bearing on his knowledge of the eventual disposition of the goods worked on by him:

> "Q. Do you know where the dresses were shipped from C. H. D. Robbins Company?
>
> "A. From C. H. D. Robbins Company?
>
> "Q. Yes.
>
> "A. I do not."

Benjamin Weinstein (R. 130-2) — This tenant occupied 3,378 square feet of the eighth floor of petitioner's building during the entire period in suit (R. 336B). His business and activities were testified to solely by Frieda Cohen, a forelady in his establishment. She testified merely that

Mr. Weinstein was a contractor working exclusively for M. Gollomp & Sons of 501 Seventh Avenue, who had other contractors (R. 132).

Raizen & Trager (R. 167-8).—This firm occupied 2,427 square feet of the twenty-third floor of petitioner's building throughout the entire period in suit (R. 336B). The only witness concerning this tenant was Emil Raizen, a member of the firm, who testified that during the said period he did contracting for Herman Byspill of 570 Seventh Avenue, New York City. He testified merely that he never saw the original orders received by the manufacturer for the dresses made by his firm (R. 168) and that all the goods his firm worked on were supplied by the manufacturer.

Schrader & Razarnick (R. 176-7).—This tenant occupied 2,800 square feet on the eighteenth floor of petitioner's building throughout the period in suit (R. 336B). The sole testimony concerning this tenant was given by Miss Florence Cahman, an employee of the tenant. She testified only that the tenant was a contractor for Sheila Lynn, a manufacturer, of 1400 Broadway, New York City, and that the tenant "gets everything sent in from the manufacturer" (R. 177).

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IN THE

Supreme Court of the United States

October Term, 1945

No. 517

D. A. SCHULTE, INC.,
Petitioner,

against

SALVATORE GANGI, suing on behalf of himself and other employees similarly situated,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR PETITIONER

EDWIN A. FALK
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REPLY BRIEF FOR PETITIONER

The briefs of the respondents and the Wage and Hour Administrator, as *amicus curiae*, both seek to fill the gap in the record on the question of coverage by resorting to a theory that the mere proof of location of petitioner's building in the garment district of New York City brought the building *per se* within the Fair Labor Standards Act.

This theory is an attempted extension of the scope of the opinion of this Court in *Warren-Bradshaw Drilling Co.* v. *Hall*, 317 U. S. 88. The theory is nothing more or less than that the Act is applicable to all employers in any industry affecting interstate commerce. As pointed

out by this Court in *Kirschbaum* v. *Walling*, 316 U. S. 517, 522, such coverage by industrial classification was rejected by Congress in framing the Act:

> "The history of the legislation leaves no doubt that Congress chose not to enter areas which it might have occupied. As passed by the House, the bill applied to employers 'engaged in commerce in any industry affecting commerce.' See H. Rep. No. 2182, 75th Cong. 3 Sess. p. 2; 83 Cong. Rec. 7749, 7750. But the bill recommended by the conference applied only to employees 'engaged in commerce or in the production of goods for commerce.' H. Rep. No. 2738, 75th Cong. 3rd Sess. pp. 29, 30; 83 Cong. Rec. 9158, 9266, 9267."

See also *Walling* v. *Jacksonville Paper Co.*, 317 U. S. 564, 570, and *Higgins* v. *Carr Brothers Co.*, 317 U. S. 572, 574.

The Administrator himself heretofore has disclaimed such coverage by industrial classification.

In Interpretative Bulletin No. 1 released by the Wage and Hour Administrator October 12, 1938, shortly before the Act became effective, the Administrator stated that the Act "does not confer upon the Administrator any general power to issue rulings including industries within the coverage of the Act, or excluding them." After recounting that Congress had rejected a proposal putting employees within the Act on an industrial basis, the Administrator continued: "Under the Act, employments are included or excluded by the terms of the statute itself as interpreted by the courts, and not by the force of any administrative action." The release further stated: "It is noted that the coverage as described in sections 6 and 7 does not deal in a blanket way with industries as a whole. Thus, in section 6, it is provided that every employer shall pay the statutory minimum wage to 'each of his employees

who is engaged in commerce or in the production of goods for commerce.' It thus becomes an individual matter as to the nature of the employment of the particular employee. *Some employers in a given industry may not be subject to the Act at all; other employers in the industry may be subject to the Act in respect to some of their employees, and not others; still other employers in the industry may be subject to the Act in respect to all their employees, except those specifically exempted by the later provisions of Section 13-a.*" (Italics supplied.)

Aside from the weaknesses in the analogy between the garment industry of New York City and the oil-well interstate pipe-line industry of Texas dealt with in *Warren-Bradshaw Drilling Co.* v. *Hall, supra*, petitioner here; the mere lessor of the contractor-tenants who worked for local manufacturers, is one important step further removed from the alleged stream of interstate garments than was the driller in the *Bradshaw* case from the stream of interstate oil.

The question of coverage, as all of the parties agree, not only is one that will be decisive in itself should this Court find lack of proof of coverage, but also is of the utmost importance in the question of whether or not there was such a *bona fide* dispute as brings the facts here squarely within the question expressly reserved by this Court from the holding of *Brooklyn Savings Bank* v. *O'Neil*, 324 U.S. 697, that a release of liquidated damages under the Act is invalid in the absence of a *bona fide* dispute.

As to the question of the validity of the releases here, the briefs of the respondents and of the Administrator take different positions.

Respondents' brief, which makes no denial that there was a *bona fide* dispute, argues that (Resp. brief, p. 12):

> "While it is true that this Court in *Brooklyn Savings Bank* v. *O'Neil* found as a fact that there was no

bona fide dispute between the parties therein as to coverage or amount, yet the same public policy considerations which found that the release therein was invalid would dictate that a release obtained as a result of a settlement of a *bona fide* dispute between the parties with respect to coverage would be invalid."

The Administrator's brief, on the other hand, does not argue that a release given in settlement of a *bona fide* dispute is invalid but takes the position that there was no *bona fide* dispute here. Moreover, as we read the Administrator's brief, he argues that there could not have been a *bona fide* dispute (Gov. brief, pp. 20-21), because of the decision of this Court in *Warren-Bradshaw Drilling Co.* v. *Hall, supra,* rendered November 9, 1942, *subsequent* to the delivery of the releases by the respondents here.

The fallacies of such an argument are: (1) the question as to the *bona fides* of the dispute depends for its answer upon the minds of the parties at the time of the dispute and nothing not then available, such as a decision not then handed down, could have entered the minds of the parties or shed light upon the controversy that was compromised and settled prior to the decision; (2) the decision in *Warren-Bradshaw Drilling Co.* v. *Hall, supra,* has no application to the facts as to coverage in the instant case and would not have resolved the question in dispute between the parties even had they had clairvoyant powers and been able to foresee with certainty what this Court was going to hold several weeks thereafter; and (3) even if this Court, contrary to the decisive distinction between the facts at bar and those in the *Bradshaw* case that is respectfully urged by petitioner, should conclude that the question of coverage here is determined by the *Bradshaw* case, surely the question would not be regarded as so free from reasonable doubt that the parties could not in entire good faith have disagreed as to such applicability of the *Bradshaw* case even if they had been gifted with clairvoyant powers.

Without a reversal of the Administrator's recent and considered declaration as to the public policy underlying the Act, he could not now support respondents' contention that the releases would be invalid even if delivered after a *bona fide* dispute.

This question of public policy is discussed in the brief of the Administrator as *amicus curiae* submitted to this Court in *Brooklyn Savings Bank* v. *O'Neil*, *supra*, where he says (Govt. brief in *Brooklyn Savings Bank* v. *O'Neil*, p. 20):

> "The factors which we have mentioned suggest, to us, the difficulty and perhaps the inadvisability from the standpoint of the policy of the Act of framing a sweeping generalization that all releases of liquidated damages are either valid or invalid."

In the same brief the Administrator explains why it would do more harm than afford protection to employees to place them, to use the phrase of the Chief Justice in his dissenting opinion in the *Brooklyn Savings Bank* case "so far in tutelage as not to be free to give" a release even where there is a *bona fide* dispute and the employee receives the full wages prescribed by the Act. That brief of the Administrator in the *Brooklyn Savings Bank* case also explains that "the Department of Justice is a party to settlements in which the employees do not receive full liquidated damages" (p. 19). These settlements, it is pointed out, are entered into by the War and Navy Departments with the employees of cost-plus contractors after investigations by the Administrator as to liability under the Act. The brief adds (pp. 19-20):

> "If it is decided by the contracting agency, the Administrator, or on appeal by the Assistant Attorney General, that the employee should prevail, the United States Attorney handling the case is directed to negotiate a tentative settlement with the em-

ployee's counsel for submission to the contracting agency for acceptance or rejection. The wages due are of course always paid, but the claim for liquidated damages is the subject of bargaining, and almost invariably the employee's counsel is willing to accept considerably less than the total amount of liquidated damages. After payment of the amount agreed on, a judgment is entered dismissing the suit with prejudice, thereby preventing the employee from seeking to recover more on the same claim."

The entire argument of the Administrator in the *Brooklyn Savings Bank* case takes for granted that a release of liquidated damages freely and fairly delivered in settlement of a *bona fide* dispute upon full payment of the wages due under Sections 6 and 7 of the Act is valid (p. 12, footnote 10, and p. 21).*

And none of the cases cited by respondents for the proposition that the Act prohibits a release of liquidated damages upon the settlement of a *bona fide* dispute, involved the settlement of a *bona fide* dispute between an employer and employee with respect to coverage under the Act.

One of the grounds upon which certiorari was prayed herein was the conflict between the decision of the Circuit Court of Appeals in the instant case and the decision to the contrary effect of the Circuit Court of Appeals for the Fifth Circuit in *Atlantic Co.* v. *Broughton*, 146 Fed. (2d) 480 (C. C. A. 5) (Petition for Certiorari, p. 17). In that case the Court said (p. 482):

---

* The discussion by Dodd in *Administration of Workmen's Compensation*, p. 186 *et seq.*, referred to in the Circuit Court of Appeals opinion, R. 325, and also referred to in footnote 10 of the Administrator's brief herein (p. 20), has no applicability to the instant case, because in none of the workmen's compensation acts of the various States is there a provision similar to Section 16 (b) of the Fair Labor Standards Act for the payment of liquidated damages.

"Though created by statute, the liability to pay liquidated damages is no different from any other ordinary obligation to pay a sum of money. It is in the nature of a Congressional estimate of the damages resulting to an employee from a wrongful withholding of any part of his wages or overtime compensation. As such, it is a proper subject of accord and satisfaction.

"If, as cross-appellees contend, the payments in settlement were made under such circumstances as would create an agreement of accord and satisfaction, the claim for liquidated damages upon the amounts given in settlement was extinguished."

Respectfully submitted,

EDWIN A. FALK,
ABRAHAM FRIEDMAN,
Counsel for Petitioner.

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IN THE

Supreme Court of the United States

October Term, 1945

No. 517

D. A. SCHULTE, Inc.

Petitioner

against

SALVATORE GANGI, suing on behalf of himself and other employees similarly situated

Respondent

RESPONDENT'S BRIEF

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

ISIDORE EXTES
Counsel for Respondent

IN THE

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RESPONDENT'S BRIEF

Statement

Respondent, suing on behalf of himself and nineteen other enumerated persons, brought this action under Section 16 B of the Fair Labor Standards Act of 1938, 29 U. S. C. A., Section 216 (b) to recover unpaid overtime compensation from October 24, 1938 to February 5, 1942 together with liquidated damages and reasonable attorney's fees. Respondents were building maintenance employees employed at petitioner's twenty-three story loft building at 571-583 Eighth Avenue, New York City.

The complaint alleges that during their employment by the defendant, the plaintiff and the other enumerated employees worked a number of hours each week in excess

of the applicable maximum workweek set forth in Section 7 of the Act, without receiving the prescribed overtime compensation. It is further alleged that during the period of their employment a substantial number of tenants in the building were engaged in the production of goods for interstate commerce, and that the plaintiff's and others' duties were necessary to the production of goods during the period of October 24, 1938 to February 5, 1942.

It is uncontroverted that during the period in question the plaintiff and the others worked a number of hours each week in excess of the applicable maximum workweek set forth in the Act without receiving the prescribed overtime compensation. On or about September 24, 1942, long after said overtime compensation had been due and after the decision of the Supreme Court in *A. B. Kirschbaum & Co.* v. *Walling*, 316 U. S. 517, the defendant paid the plaintiff and the others their overtime compensation. On the theory that at the time the defendant paid the plaintiff and others the past due overtime compensation, it was then equally liable for an additional equal amount as liquidated damages. (See Sec. 16 (b) of the Act), this action was instituted to recover the latter sum together with reasonable attorney's fees.

The defendant's answer alleged the affirmative defenses of Accord and Satisfaction and Release, among other defenses and denied that it was bound by the Act.

The action was tried in the United States District Court of the Southern District of New York and resulted in a judgment dismissing the complaint (R. 314). The Court upheld the affirmative defenses of Accord and Satisfaction and Release as a matter of law (R. 314). The District Court found it unnecessary to pass on the question of coverage (R. 314).

The Court below held that the releases are ineffective to bar the action (R. 323) and that the defenses of Accord and Satisfaction are invalid here (R. 324), citing *Brooklyn Sav. Bank* v. *O'Neil* and *Dize* v. *Madrix*, 65 S. Ct. 895. The Court below held that there was coverage for the entire period in suit except for the year 1939 (R. 326).

REASON RELIED ON FOR DENYING THE WRIT

The decision below is in complete accord with the decisions of this Court in *Brooklyn Savings Bank* v. *O'Neil*, 65 S. Ct. 895, and *Warren-Bradshaw Drilling Co.* v. *Hall*, 317 U. S. 86.

The Court below stated

> "In practical fact the O'Neil case does not offer support for appellee's contention. For there, too, the employer disputed coverage, finally paid the overtime wages due, and forced suit to be brought for the balance. Except for the fact that the present appellee may have been more vociferous in its assertion that its business is local,[4] the facts here are exactly the same as those in the O'Neil case. It may be that, where there is a genuine dispute not as to the law of the Act, but as to facts, such as the amount of labor actually performed, the parties may work out together a fair adjustment of the dispute and that it was this type of situation which the Supreme Court wished to reserve for fu[illegible]er consideration. But use of a disagreement as to the legal interpretation of the Act, turning upon the nature of the employer's business, as a basis for reducing payments under those required by the Act, appears definitely prohibited by the O'Neil case. See 57 Harv. L. Rev. 257; 55 [fol. 481] Harv. L. Rev. 150; 43 Col. L. Rev. 355, 359; *cf.* also Dodd, Administration of Workmen's Compensation, 1936, 186 *et seq.*" (R. 324, 325).

There is absolutely no evidence of any kind whatsoever in the record to show that the petitioner made any effort to ascertain the true nature of its tenants' businesses so

[4] Even this would seem doubtful; see note 2, above.

as to determine whether there was coverage. How had the petitioner exercised his good faith in this alleged dispute? To permit an employer's mere denial of coverage as the basis for a "bona fide dispute" so as to discharge the employer from any and all liability under the Act would make available a simple method for avoiding "the deterrent effect which Congress plainly intended that Section 16 (b) should have." *Brooklyn Savings Bank* v. *O'Neil*, *supra.*

In *Warren-Bradshaw Drilling Co.* v. *Hall*, *supra*, 317 U. S. 88, 92, this Court held:

> "The Act extends at least to the employer who expects goods to move in interstate commerce, *Ibid.* Assuming that such expectation or reasonable basis therefore, was necessary on petitioner's part before the application of the Act to petitioner. It is here present. The record contains ample indication that there were reasonable grounds for petitioner to anticipate at the time of drilling that oil produced by the wells drilled would move into other states. Petitioner closely identified as it is with the business of oil production, cannot escape the impact of the Act by a transparent claim of the ignorance of the interstate character of the Texas Oil Industry."

If the words "oil" and "Texas" are replaced by the words "garment" and "New York" respectively, the above ruling would be directly applicable to the instant case at bar. The petitioner's building is located in the garment district of New York and that for a period of years it regularly rented factory space to contractors and manufacturers in the garment industry. The bulk of tenants are contractors manufacturing goods on the premises. The Court below held that except for the year 1939 more than 20% of the petitioner's tenants were engaged

in the production of goods and "had at the very least reasonable grounds to anticipate that their products would move in other states" (R. 326).

It is respectfully submitted that there is not here presented a proper occasion for the exercise of the supervisory power of this Court.

SALVATORE GANGI,
Suing on behalf of himself and other employees similarly situated, Respondent,

ISIDORE ENTES,
Counsel for Respondent.

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CHARLES ELMORE CROPLEY
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IN THE

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October Term, 1945

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Respondent.

RESPONDENT'S BRIEF

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

ISIDORE ENTES
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IN THE

Supreme Court of the United States

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No. 517

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Petitioner,

against

SALVATORE GANGI, suing on behalf of himself and other employees similarly situated,

Respondent.

BRIEF FOR THE RESPONDENT

Opinions Below

The opinion of the District Court is reported at 53 Fed. Supp. 844 (R. 309-14).

The majority and dissenting opinions of the Circuit Court of Appeals are reported at 150 Fed. (2d) 694 (R. 322-328).

Jurisdiction

The decision of the Circuit Court of Appeals was rendered July 20, 1945. An order, upon stipulation of the parties, was made by the said Court staying the mandate until October 20, 1945, pending the filing of a petition for writ of certiorari.

Petition for writ of certiorari was filed October 17, 1945, and was granted November 19, 1945 (R. 340).

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, 28 U. S. C., Section 347 (a); 8 F. C. A., Title 28, Section 347 (a).

Statement

Respondent suing on behalf of himself and nineteen others, brought this action under Sec. 16 (b) of the Fair Labor Standards Act of 1938, 29 U. S. C. A. Section 216 (b) to recover amounts claimed to be due them under Section 7, 29 U. S. C., Section 207 because of the failure of the petitioner, their employer, to pay them overtime wages from October 29, 1938 to February 5, 1942, for their services as maintenance employees in petitioner's twenty-three story loft building at 571-583 Eighth Avenue, New York City.

After the decision of this Court in *A. B. Kirshbaum* v. *Walling*, 316 U. S. 517, 524, June 1, 1942, holding that the Act applied to maintenance employees of a building where the tenants of a building are engaged principally "in the production of goods for interstate commerce" and after the decision of this Court in *Overnight Motor Transport Co.* v. *Missel*, 316 U. S. 572, June 8, 1942, holding that in view of the mandatory character of the statutory language, an employer who failed to pay the statutory overtime pursuant to Section 7, 29 U. S. C. A. Section 207, became automatically liable for "an additional equal amount as liquidated damages" under Section 16 (b) 29 U. S. C. A. Sect. 216 (b), the employees at petitioner's building through two representatives, demanded that the petitioner pay them the unpaid overtime compensation and an equal amount as liquidated damages (R. 29, 39, 276). Petitioner denied liability on the ground that the tenants in its build-

ing were principally "contractors who furnished labor rather than making any material for interstate commerce" (R. 275). For approximately two months it refused to pay. Respondents having threatened suit (R. 29, 277), it offered to pay all the overtime compensation without the liquidated damages. The respondents accepted the sums of money tendered to them as the full overtime compensation. There was no dispute as to the accuracy of the amounts for the unpaid overtime compensation as alleged in the formal releases which the respondents executed upon receipt of payment (R. 39). The releases acknowledged receipt of the specified sum as "payment in full of all further claims" under the Act (R. 279, 281). Prior to the acceptance of said sums, respondent had spoken by telephone to "some woman" in the Wage & Hour Division and to his council chairman from the Union as to what his rights were (R. 25). The respondent had not consulted with any attorney (R. 25). About seven months thereafter, this action was instituted. The District Court upheld affirmative defenses of accord and satisfaction and releases and dismissed the complaint (R. 314), 53 F. Supp. 844.

The Circuit Court of Appeals reversed the District Court (R. 322) and held (1) that the releases herein were ineffective to bar the action (R. 232) and that (2) that the defense of accord and satisfaction herein was insufficient to bar the action (R. 325) and (3) that the petitioner was liable under the Act as to the years 1940, 1941 and part of 1942 (R. 326).

Questions Presented

The questions presented are:

1. Whether, in an action by employees for their statutory liquidated damages, the Fair Labor Standards Act of 1938 (29 U. S. C., Section 201 *et seq.**) prohibits the de-

* C 676, 52 Stat. 1060, hereinafter referred to as the "Act".

fenses of Release, Accord and Satisfaction, and Compromise and Settlement of claims for statutory liquidated damages under Section 16 (b) of the Act (29 U. S. C., Section 216 (b)) based on a dispute between an employer and its employees with respect to coverage under the Act.

2. Whether building maintenance employees are entitled to the benefits of the Act where it is found that the tenants occupying a substantial portion of a loft building are engaged in the production of goods for interstate commerce.

Statute Involved

Pertinent provisions of the Fair Labor Standards Act of 1938 (52 Stat. 1060, 29 U. S. C., Section 201 *et seq.*) are set out in the Appendix.

ARGUMENT

POINT I

Considerations of Paramount Public Policy Dictate that Release, Accord and Satisfaction, and Settlement and Compromise, are not Good Defenses to an Action by an Employee to Recover Liquidated Damages under the Fair Labor Standards Act.

A.

The liability for liquidated damages under Sec. 16 (b) is a mandatory liability regardless of the nature of the violation.

Section 16 (b) of the Act insofar as here applicable reads as follows:

> Any employer who violates the provisions of Section 6 or Section 7 of this Act shall be liable to

> the employee or employees affected in the amount of their unpaid minimum wages or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages.

The mandatory character of the liability for liquidated damages under Section 16 (b) regardless of the nature of the violation has been clear since *Overnight Motor Transportation Co.* v. *Missel*, 316 U. S. 572 (1942) aff'g. 126 F. (2d) 98 (C. C. A. 4, 1942). The Circuit Court of Appeals had there said:

> Is this provision of the law as to liquidated damages mandatory or discretionary? Since the Act has been violated in good faith in this case, we would indeed like to hold that it is discretionary. It seems a keen injustice for employers bewildered by strange legislation and confused by divergent authority in the Courts to be subjected to such a measure. Yet no matter how much we lament its harshness, the section appears to be mandatory and virtually all of the Courts have so construed it. The use of the word "willful" in Section 16 (a) defining criminal liability under the Act and its omission in Section 16 (b), defining civil liability would seem to indicate that the employer's good faith is immaterial under Section 16 (b). (126 F. (2d) 110 111.)

In affirming, this Court held that "liquidated damages were mandatory on the courts regardless of the good faith or the reasonableness of his attitude."

In *Rigopoulos* v. *Kervan*, 140 F. (2d), 503 (C. C. A. 2) the Court stated as follows:

> Thus the overtime compensation was paid long after it was due. Section 7 of the Act, 29 U. S. C. A., Sec. 207, plainly contemplates that overtime compensation shall be paid in the regular course of employment and not accumulated beyond a regular pay day. See *Lofton* v. *Seneca Coal & Coke Co.*, 136 F. (2d) 359, 363 (C. C. A. 10), Cert. denied October 18,

1943. Hence the failure to pay it when due, was a violation of Sec. 7, which rendered the employer "liable", as declared in Section 16 (b), not only for unpaid overtime compensation but also for liquidated damages in an additional equal amount. This is a single and entire liability.

It is not discharged *in toto* by paying one-half of it. The liquidated damages provision has been held to be mandatory on the court regardless of the good faith of the employer or the reasonableness of his belief that no overtime compensation was owed. *Overnight Motor Transportation Co.* v. *Missel*, 316 U. S. 572, 582-3; *Lofton* v. *Seneca Coal & Coke Co.*, *supra*. It is alleged that such a construction of the statute produces too harsh a result; but the harshness is inherent in the legislation. We see no escape from the statutory language.

Thus the respondent here was automatically entitled to liquidated damages unless a release, and an accord and satisfaction were good defenses to this action.

B.

The public policy underlying legislation, prescribing in the public interest minimum wage and maximum hour standards for the benefit of wage earners forbids a release, an accord and satisfaction, and a settlement or compromise of any part of the sums required to be paid by the employer to the employee.

The public policy underlying the Fair Labor Standards Act has been very recently enunciated by this Court in *Brooklyn Savings Bank* v. *O'Neil*, 324 U. S. 697, 89 L. ed. 876:

> The legislative history of the Fair Labor Standards Act shows an intent on the part of Congress to protect certain groups of the population from substandard wages and excessive hours which endangered the national health and well-being and the free flow of goods in interstate commerce. The statute

> was a recognition of the fact that due to the unequal bargaining power as between employer and employee, certain segments of the population required Federal compulsory legislation to prevent private contract on their part which endangered national health and efficiency and as a result the free movement of goods in interstate commerce . . .
>
> It constitutes a Congressional recognition that failure to pay the statutory minimum on time may be so detrimental to maintenance of the minimum standard of living "necessary for health, efficiency and general well-being of worker" and to the free flow of commerce, that double payment must be made in the event of delay in order to insure restoration of the worker to that minimum standard of well-being.

In *Tennessee Coal Co.* v. *Muscoda Local*, 321 U. S. 590 (1944), this Court stated as follows:

> These provisions, like the other portions of the Fair Labor Standards Act are remedial and humanitarian in purpose. We are not here dealing with mere chattels or articles of trade but with the right of those who toil, of those who sacrifice a full measure of their freedom and talents to the use and profits of others. These are the rights that Congress has specially legislated to protect.

Thus, agreements of release, waiver, compromise and settlement, or accord and satisfaction have uniformly been held unavailing as defenses to action by employees to recover any part of sums required to be paid by them under paramount provisions of law enacted for the public welfare *U. S.* v. *Morley Constr. Co.*, 98 F. (2d) 781 (C. C. A. 2), cert. den. sub nom. *Maryland Casualty Co.* v. *U. S.*, 305 U. S. 651; *Larsen* v. *Rice*, 100 Wash. 642, 171 Pac. 1037; *City of Glendale* v. *Coquat*, 48 Ariz. 478, 52 P. (2d) 1178; *Goebel* v. *Elliot*, 178 Wash. 444, 35 P. (2d) 44; *Cato* v. *Grendel Cotton Mills*, 132 S. C. 454, 129 S. E. 203; *Montague's Adm'r* v. *Massey*, 76 Va. 307; *Kline* v.

State of New York, 93 N. Y. 291; *Wright* v. *State*, 223 N. Y. 44; *Clark* v. *State*, 142 N. Y. 101; *Pitt* v. *Board of Ed.*, 216 N. Y. 304.

The doctrine has been well expressed in *Larson* v. *Rice*:

> It is undoubtedly a general rule that private controversies between individuals *sui juris* may be compromised by them by mutual agreement, and that the courts will not, where no question of fraud intervenes, relieve from the agreement, even though it be shown that the one gained rights thereby to which he would not otherwise have been entitled, and that the other gave up rights to which he was fully entitled; this on the principle that compromises are favored by the law, since they tend to prevent strife and conduce to peace and to the general welfare of the community. But the controversy here had an added element not found in the ordinary controversy between individuals. It was not a wholly private concern. It was affected with a public interest. * * * The statute was not therefore intended solely for the benefit of the individual wage earner. It was believed that the welfare of the public requires that wage-earners receive a wage sufficient for their decent maintenance. The statute being thus protective of the public as well as of the wageearner, it must follow that any contract or settlement of a controversy arising out of a failure to pay the fixed minimum wage * * * is voidable, if not void * * *. Our opinion is that it is such a contract as the courts are not required to enforce, and that it would be against the policy of the statute so to do (171 Pac. 1037, 1039-1040).

This same principle has been applied in cases involving the Fair Labor Standards Act. The courts have repeatedly struck down as inconsistent with the public interest, agreements between employers and employees whereby employees accept sums less than the full statu-

tory amounts which the Act prescribed, *Brooklyn Savings Bank* v. *O'Neil*, 324 U. S. 697, 89 L. ed. 876, *Fleming* v. *Post*, 146 F. (2d) 441, *Campbell* v. *Mandel Auto Parts*, 31 N. Y. Supp. (2d) 656, aff'd 264 App. Div. 701. See also *Fleming* v. *Warshawsky & Co.*, 123 F. (2d) 622 (C. C. A. 7, 1941); *Birbalas* v. *Cuneo Printing Industries, Inc.*, 140 F. (2d) 826 (C. C. A. 7, 1944); *Johnson* v. *Dierks Lumber Co.*, 130 F. (2d) 115 (C. C. A. 8, 1942); *Carleton Screw Products* v. *Fleming*, 126 F. (2d) 537, 541 (C. C. A. 8, 1942); *Hutchinson* v. *Barry*, 44 F. Supp. 823 (D. Mass. 1942); *Wilkinson* v. *Noland, Inc.*, 40 F. Supp. 1009 (E. D. Va. 1941); *Rigopoulos* v. *Kervan*, 47 F. Supp. 576 (S. D., N. Y. 1943), aff'g 140 F. (2d) 506 (C. C. A. 2, 1943); *Hall* v. *Smith*, 5 Wage Hour Rept. 637, 6 Labor Cases par. 61, 180 (E. D. Ky. 1942); *Travis* v. *Ray*, 41 F. Supp. 6 (E. D. Ky. 1941); *Fiedler* v. *Potter*, 172 S. W. (2d) 1007 (Sup. Ct. Tenn. 1943); *Strand* v. *Garden Valley Telephone Co.*, 51 F. Supp. 898 (D. Minn. 1943); *Cudahy Packing Co. of Ala.* v. *Bazquos*, 15 So. (2d) 720 (Sup. Ct. Ala. 1943); *U. S.* v. *Johnson*, 6 Wage Hour Rept. 1065 (W. D. N. Y. 1943).

In *Fleming* v. *Warshawsky*, the Circuit Court of Appeals held that the releases were invalid.

> The court found that they were obtained voluntarily and without coercion. In our view of the matter, the manner in which they were obtained is immaterial. * * * Defendants concede that an agreement, in advance of employment, to accept less than permitted by law would render nugatory the objectives of the Act. We think precisely the same result would follow if the employer, by agreement with its employees, be permitted to pay less than the Act prescribes. Waivers in advance of employment are no different in substance or effect than waivers of back pay for past employment. * * * In each situation, the statutory requirements and the purposes of the legislation are ignored (123 F. (2d) 622, 626).

In *Rigopoulous* v. *Kervan*:

> Thus the overtime compensation was paid long after it was due. Section 7 of the Act, 29 U. S. C. A., Sec. 207, plainly contemplates that overtime compensation shall be paid in the regular course of employment and not accumulated beyond a regular pay day. See *Lofton* v. *Seneca Coal & Coke Co.*, 136 F. (2d) 359, 363, (C. C. A. 10), cert, denied October 18, 1943. Hence the failure to pay it when due, was a violation of Sec. 7 which rendered the employer "liable", as declared in Section 16 (b) not only for unpaid overtime compensation but also for liquidated damages in an additional equal amount. This is a single and entire liability.
>
> It is not discharged *in toto* by paying one-half of it. The liquidated damages provision has been held to be mandatory on the court regardless of the good faith of the employer or the reasonableness of his belief that no overtime compensation was owed. *Overnight Motor Transportation Co.* v. *Missel*, 316 U. S. 572, 582-3; *Lofton* v. *Seneca Coal & Coke Co.*, *supra*. It is alleged that such a construction of the statute produces too harsh a result; but the harshness is inherent in the legislation. We see no escape from the statutory language.

The District Court in the same case had previously held:

> This provision of law giving the right to liquidated damages is mandatory and not discretionary. An employee may not bargain this right away. There must be full payment under the statute.
>
> The employee may not give a valid release of his rights against the employer in consideration of receiving payment of an amount less than that provided by statute. *Fleming* v. *Warshawsky*, 123 Fed. (2d) 622; *Travis* v. *Ray*, 41 Fed. Supp. 6; *Campbell* v. *Mandel Auto Parts*, *supra* (47 F. Supp. 576).

The Seventh Circuit Court of Appeals, in *Birbalas* v. *Cuneo Printing Industries, Inc.* held:

The language of the statute and its interpretation by various courts tend toward promulgation of the doctrine that in cases such as this, the liability created by Congress for non-payment of overtime wages and for liquidated damages and attorney's fees may not be compromised; that it is a single and entire cause of action which cannot be discharged or satisfied by paying merely part of it. * * *

If it were possible, we would prefer to sustain the validity of the releases, but no matter how much we may lament the law's harshness, the section appears to be mandatory. Relief from severity must come from the Congress and not from the Court. * * *

Payment of compensation alone to persons endowed with additional rights was not sufficient to satisfy the entire liability (140 F. (2d) 826, 828-829).

In *Strand* v. *Garden Valley Telephone Co.*:

Defendant also resists the action on the ground that the plaintiffs have released and discharged the defendant from liability on the claims for which recovery is sought. An employee under the Fair Labor Standards Act of 1938 may not bargain away such rights as are given by the Act. The right to damages for failure on the part of the employer to pay an employee the minimum wage is mandatory and does not become a matter of discretion for the courts, nor a matter of agreement between the parties. To hold otherwise would be an abortion of the intent of Congress, defeat in part the purposes for which the act was passed, and open the way to injustice, if not to fraud * * *. The plaintiff * * * did not have the right under the law to compromise or settle for lesser benefits than the law provides. Such receipt and release or agreement as were executed * * * did not bar recovery in this action. (51 F. Supp. 898, 904.)

In the instant case, the Circuit Court of Appeals held:

> But in *Fleming* v. *Post*, 2 Cir. 146 F. 2d, 441, 443, where this court, adopted the rule later approved in the *O'Neil* case that a release of liquidated damages was invalid, it went on to say definitely that "we should reach the same result if there were here an accord and satisfaction." And no other result would be in keeping with the policy and provision of this Act. For as this court pointed out in *Rigopoulos* v. *Kervan*, 2 Cir. 140 F. 2d 506, 507, 151 A.L.R 1126, the employer's liability for unpaid overtime compensation and liquidated damages in an additional equal amount "is a single and entire liability which "is not discharged in *toto* by paying one-half of it.

While it is true that this Court in *Brooklyn Savings Bank* v. *O'Neil* found as a fact that there was no *bona fide* dispute between the parties therein as to coverage or amount, yet the same public policy considerations which found that the release therein was invalid would dictate that a release obtained as a result of a settlement of a *bona fide* dispute between the parties with respect to coverage would be invalid.

In that case this Court held:

> And not the least effective aspect of the remedy is the possibility that an employer who gambles on evading the Act will be liable for payment not only of the basic minimum originally due but also damages equal to sum left unpaid * * * (Footnote 20). The necessity of prompt payment to workers has long been recognized by Congress as well as by State legislatures * * *
>
> We are of the same opinion that the same policy considerations which forbid waiver of the basic minimum and overtime wages under the Act also prohibit waiver of the right to liquidated damages.

If in the event of a dispute as to coverage, employees can bargain away their statutory liquidated damages under the Act then the legislative intent would be thwarted and defeated inasmuch as the validity of such settlements

would encourage employers to gamble on evading the Act by not making prompt payments since they would not necessarily have to pay an additional equal amount as liquidated damages when they finally pay the basic minimum or overtime originally due. Another very strong motivating factor for employers to delay in making prompt payments would be the fact that if the employees could bargain away their liquidated damages, the employers would save not alone the liquidated damages, but the accrued interest on the basic minimum or overtime originally due when they finally paid it since the item of interest on the unpaid basic minimum or unpaid overtime has been held by this Court to be an element of liquidated damages. *Arsenal Building Corp. v. Meyer Greenberg*, 324 U. S. 697, 89 L. ed. 876.

In the instant case, the employees were deprived of the use of part of their earnings for a period of more than two years without any compensation therefor.

It therefore follows that the legislative intent underlying the Act can only be carried out by the payment of the basic minimum or overtime due together with an additional equal amount as liquidated damages whenever there is a violation of the Act.

In the instant case, the Circuit Court of Appeals held:

> In practical fact the O'Neil case does not offer support for appellee's contention. For there, too, the employer disputed coverage, finally paid the overtime wages due, and forced suit to be brought for the balance. Except for the fact that the present appellee may have been more vociferous in its assertion that its business is local,[4] the facts here are exactly the same as those in the O'Neil case. It may be that, where there is a genuine dispute not as to the law of the Act, but as to facts, such as the amount of labor actually performed, the parties may work out together a fair adjustment of the dispute and that

[4] Even this would seem doubtful.

> it was this type of situation which the Supreme Court wished to reserve for further consideration. But use of a disagreement as to the legal interpretation of the Act, turning upon the nature of the employer's business, as a basis for reducing payments under those required by the Act, appears definitely prohibited by the O'Neil case. See 57 Harv. L. Rev. 257; 55 (fol. 481) Harv. L. Rev. 150; 43 Col. L. Rev. 355, 359; cf. also Dodd, Administration of Workmen's Compensation, 1936, 186 *et seq.* (R. 324, 325).

Petitioner herein as well as petitioner in Brooklyn Savings Bank *v.* O'Neil places much reliance on the fact that other Federal statutes for wages or whose public policy it alleges is similar to the Fair Labor Standards Act permit settlement, or compromise (Pet. Br. 16, 17).

This Court in Brooklyn Savings Bank *v.* O'Neil resolved this issue:

> Petitioner relies on the fact that other Federal Statutes authorizing employees to sue for wages or for damages arising from injuries sustained in the course of employment contained specific provisions prohibiting waiver of rights under the Acts involved or provided means by which compromises and settlements can be approved. The decision in the instant case is based on the legislative policy behind this enactment.

Reference is made in petitioner's brief to the fact that this Court "approved, *per curiam*" stipulations of settlement in *North Shore Corporation, Petitioner* v. *Barnett, et al., id.* v. *Scott, et al.*, 323 U. S. 679 (Pet. Br. 19). In view of the fact, that these stipulations were signed by the attorneys for the respective parties thereto, the Court did not pass on the merits of the issues therein since they had become moot questions.

This Court recently took cognizance of the inherent inhibition against waivers of rights created by statutes affecting the public welfare in *Midstate Horticultural Co.*

v. *Penn. R. R. Co.*, 320 U. S. 356, 88 L. Ed. 83 (1943), when it held:

> Section 16 is an integral part of the Interstate Commerce Act and of the comprehensive scheme of regulation it imposes. The Act is affected throughout its provisions, with the object not merely of regulating the relations of carrier and shipper *inter se*, but of securing the general public interest * * *. Accordingly, in respect to many matters concerning which variation in accordance with the exigencies of particular circumstances might be permissible, if only the parties' private interests or equities were involved, rigid adherence to the statutory scheme and standards is required. This obviously may work hardship in some cases, but it embodies the policy which has been adopted by Congress in the regulation of interstate commerce. * * *
>
> In view of considerations of paramount public policy no defense of release, accord and satisfaction, settlement or compromise may bar respondent's recovery here.

POINT II

Respondent established coverage under the Act and was entitled to the benefits of the Act.

Section 3 (j) of the Act provides that "for the purposes of this Act an employee shall be deemed to have been engaged in the production of goods if such was employed * * * in any process or occupation necessary to production thereof, in any State."

There is no doubt since the decision of this Court, in *Kirshbaum* v. *Walling*, and *Arsenal Building Corporation, et al.* v. *Walling*, 316 U. S. 517, that maintenance employees of a loft building wherein "large quantities of goods are produced for interstate commerce" are entitled to the benefits of the Act.

In the instant case, the District Court found the salient characteristics of the dress manufacturing industry in New York City to be as follows:

> It appears that the building is tenanted by many persons who serve the dress manufacturing industry. The latter industry, in the City of New York, seems to be organized along the following lines. The dress manufacturer purchases the fabrics and other materials which go into the production of a dress, and usually has the material cut in accordance with his own designs. He maintains a showroom and sales force for the exhibition and sale of his wares. He does not manufacture the dress. The actual work of fabrication is performed by a number of contractors of whom there are several varieties. One variety consists of dress contractors. They employ a force engaged in sewing garments. The second variety consists of contractors who pleat, trim and stitch. Their work is performed upon the garments either before or after they are handled by the dress contractor, as the designs permit. A third variety consists of those who fabricate belts and similar accessories. All the contractors get the fabrics from the manufacturer and return them, after they have received the benefit of their services to the manufacturer. These manufacturers are located within the City of New York. The defendant's building was occupied by many of these several varieties of contractors.

At this point, respondent respectfully calls to the Court's attention that the petitioner's loft building located at 571-583 Eighth Avenue, New York City is in the immediate vicinity of the loft building of the Arsenal Building Corp., the petitioner in *Arsenal Building Corp. et al.* v. *Walling*, which is located at 463 7th Avenue, New York City. That the tenants of both of these loft buildings were engaged in the manufacturing of dresses. Respondent, further, respectfully calls the Court's attention to the undisputed fact that the bulk of the dresses sold throughout the United States emanate from New York

City where there is such a heavy concentration of their manufacture in a particular area that said area is commonly and popularly referred to as the "Garment Center". This district roughly comprises the area bounded on the south by 34th Street, on the north by 40th Street, on the east by the Avenue of Americas, and on the west by Ninth Avenue. Petitioner's loft building was located in the "Garment Center".

Although all of the evidence was before the District Court in the instant case, it did not find it advisable to pass on the question of coverage (R. 314). "In the view I have taken of the defenses of accord and satisfaction and release, I find it unnecessary and indeed inadvisable to pass on the question of coverage except to indicate that it presents a genuine issue with respect to which I am by no means certain that the plaintiffs have established a *prima facie* case."

In its Findings of Fact and Conclusions of Law (R. 314-319), the District Court made no finding of fact as to coverage except as to the conceded percentages.

Inasmuch as the District Court had made no finding of fact even though all the evidence had been presented to it, the Circuit Court of Appeals made a finding of fact "then from 1940 on more than 20% of the building was occupied by concerns producing goods for interstate commerce" (R. 326). Therefore it alleged that during this period the respondent was covered by the Act (R. 326).

Petitioner in its brief repeatedly alleges that the twelve additional tenants had no knowledge of the ultimate destination of the goods that they produced (Pet. Br. pp. 3, 8, 11, 22). It singles out four of these tenants, Max Schneider, Benjamin Weinstein, Raizer & Trager, and Schrader and Bazarnick as having no knowledge of the ultimate destination of the goods they produced (Pet. Br. pp. 8, 27, 29). It concedes that they "contracted" exclusively for certain manufacturers. Each "manufacturer" that these four tenants "contracted" for shipped their

dresses to points outside the State of New York (R. 207, 224, 230, 244). Each one of the twelve additional tenants served the dress manufacturing industry of New York City.

In *Warren-Bradshaw Drilling Co.* v. *Hall*, 317 U. S. 88, 92 this Court held:

> The Act extends at least to the employer who expects goods to move in interstate commerce. Ibid. Assuming that such expectation or reasonable basis therefore, was necessary on petitioner's part before the application of the Act to petitioner, it is here present. The records contain ample indication that there were reasonable grounds for petitioner to anticipate at the time of drilling that oil produced by the wells drilled would move into other states. Petitioner closely identified as it is with the business of oil production, cannot escape the impact of the Act by a transparent claim of the ignorance of the interstate character of the Texas Oil Industry.

If, we merely substitute "dress" as the commodity instead of "oil" and the locale as New York instead of Texas, then the above ruling would be directly applicable to the instant case at bar. Every one of the tenants knew or had reason to know that his dresses would be shipped to points outside the State of New York. As the Circuit Court of Appeals in the instant case held "And the testimony clearly shows that at the time of production these tenants had at (fol. 482) the very least reasonable grounds to anticipate that their products would move in interstate commerce" (R. 326).

CONCLUSION

It is respectfully submitted that the decision below was proper and should be affirmed.

Respectfully submitted,

ISIDORE ENTES,
Attorney for Respondent.

Appendix

Pertinent provisions of the Fair Labor Standards Act of 1938 (Act of June 25, 1938, c. 676, 52 Stat. 1060; 29 U.S.C. Secs. 201 *et seq.*) read as follows:

* * *

Sec. 7 (a). No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerce or in the production of goods for commerce:

(1) for a workweek longer than forty-four hours during the first year from the effective date of this seciton,

(2) for a workweek longer than forty-two hours during the second year from such date, or

(3) for a workweek longer than forty hours after the expiration of the second year from such date,

unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

* * *

Sec. 16 (b). Any employer who violates the provisions of section 6 or section 7 of this Act shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Action to recover such liability may be maintained in any court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves, and other employees similarly situated, or such employee or employees may designate an agent or representative to maintain such action for and in behalf of all employees similarly situated. The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant and costs of the action.

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In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 517

D. A. SCHULTE, INC., PETITIONER

v.

SALVATORE GANGI, ETC.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR, AS AMICUS CURIAE

The petition raises the following questions of general importance in the interpretation and administration of the Fair Labor Standards Act:

1. Whether the building maintenance employees in a loft building located in the garment district of New York City and occupied largely by contractors engaged in producing garments are entitled to the benefits of the Fair Labor Standards Act, where the proof shows that at least 20 percent of the floor space is occupied by contractors who have reason to anticipate that the garments they produce will be shipped interstate.

2. Whether there was such a *bona fide* dispute between the parties as to validate the employees' releases of their claims for liquidated damages.

STATEMENT

Respondents were employed by petitioner as building service and maintenance employees in its 23-story loft building located in the garment district of New York City at 571–583 Eighth Avenue (R. 309, 325). During the period involved in this suit, from October 24, 1938 to February 5, 1942, the building was tenanted "by many persons who serve the dress manufacturing industry" (R. 311, 275). Most of these tenants were what are known in the New York garment industry as "contractors." The contractors performed the actual work of fabricating or manufacturing the garments. The district court's opinion succinctly described the work of the contractors as follows (R. 311):

> The actual work of fabrication is performed by a number of contractors of whom there are several varieties. One variety consists of so-called dress contractors. They employ a force engaged in sewing garments. The second variety consists of contractors who pleat, trim and stitch. Their work is performed upon the garments either before or after they are handled by the dress contractor, as the designs permit. A third variety consists of

> those who fabricate belts and similar accessories. All the contractors get the fabrics from the manufacturer and return them, after they have received the benefit of their services, to the manufacturer. These manufacturers are located within the City of New York.[1]

As found by the district court, "the defendant's building was occupied by many of these several varieties of contractors" (R. 311). Petitioner conceded (R. 314) that three of the tenants were engaged within the building in the production of goods for commerce, and the district court found five other tenants to be similarly engaged (R. 314). The total space occupied by these eight tenants represented the following percentages of total rentable area: 1939—7.7 percent; 1940—8.2 percent; 1941—10.3 percent.[2] These figures do not include the space occupied by contractors as to whom there was no precise proof that they worked on specific garments shipped in interstate commerce (R. 326). "The bulk of the tenants" were in this class of contractors (R. 268, 325).

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[1] More detailed descriptions of the "jobber contractor" system can be found in Teper, *The Women's Garment Industry*, 1937, pp. 6-7; Alderfer, E. B., and Michl, H. E., *Economics of American Industry*, 1942, pp. 376-377; The Mayor's Business Advisory Committee, *Trend in New York Clothing Industry*, 1942, p. 11, Institute of Public Administration, New York.

[2] The percentages are slightly higher if calculated on the total rented area instead of the rentable area (R. 314).

While evidence was not introduced as to all of the contractors occupying the building, there was evidence showing that many other contractors, not included in the district court's figures, "had at the very least reasonable grounds to anticipate that their products would move in other states" (see opinion of circuit court of appeals, R. 326). If the tenants as to whom there was such proof be regarded as "interstate producers," the total footage occupied by interstate producers since 1940 amounted to more than 20 percent of the building (R. 326).

Until February 5, 1942, respondents were not paid the overtime compensation required by Section 7 of the Act (R. 316–317). After the decision of this Court in *Kirschbaum Co.* v. *Walling,* 316 U. S. 517, decided on June 1, 1942, respondents, through a representative of their union, requested from petitioner's district manager the statutory overtime pay and liquidated damages due them since the inception of the Act (R. 274). Upon being informed by the district manager that he "felt the building did not come under the Act" because "the tenants * * * were largely contractors who performed labor for New York manufacturers" (R. 274–275, 310), respondents requested him to "take it up with the office" (R. 275). Respondents were subsequently advised on several occasions during the next two months when the matter was discussed by respondents'

representative and petitioner's district manager that "the office felt that the building did not come under the Wage and Hour Act and they were not going to make any payments" (R. 275, 276). No further explanation, however, was offered at any time during these discussions as to why the office "felt" that the Act was inapplicable (R. 275–278). In August 1942, respondents advised the district manager that unless petitioner paid the overtime compensation plus liquidated damages due them, they would institute suit (R. 310). Respondents were informed several weeks later petitioner denied liability but would pay the unpaid overtime compensation in order to avoid litigation (*ibid.*).

Respondents were paid by check on September 24, 1942 (R. 279). On that day, petitioner's district manager came to the building and gave each of the employees a check covering his unpaid overtime compensation after each had signed a release[3] the district manager presented to him for signature (R. 279–281). The amounts paid were computed by the petitioner (R. 285), and

[3] The release stated that "The undersigned, an employee of D. A. Schulte, Inc., in premises 575 Eighth Avenue, New York City, does hereby acknowledge receipt of the sum of $------ as payment in full of all sums, if any, which may be due to the undersigned b ysaid D. A. Schulte, Inc. by reason of the Federal Wage & Hour Act, and the undersigned does hereby release said D. A. Schulte, Inc. from any other further obligations in connection therewith" (R. 317–318).

respondents did not contest their accuracy (R. 286).

Respondents subsequently brought this suit to recover the liquidated damages due them under Section 16 (b) of the Act (R. 2–6). Petitioner contended that there had been a bona fide dispute between it and the employees regarding the application of the Act and that respondents had accepted the checks in full settlement of that dispute (R. 8–9). It argued, therefore, that the releases signed by the employees barred the recovery of liquidated damages (R. 269).

The district court, concluding that "there was a genuine dispute between the parties" as to the coverage of the Act (R. 312), sustained the defense of accord and satisfaction and upheld the validity of the releases (R. 314, 319). The district court did not decide the coverage question, stating that its view of the defenses of accord and satisfaction and releases made it "unnecessary and indeed inadvisable to pass on the question of coverage, except to indicate that it presents a genuine issue with respect to which I am by no means certain that the plaintiffs have established a prima facie case" (R. 314). Its conclusion that there was a "genuine dispute" appears to have been predicated upon the assumption that plaintiffs, in order to establish coverage, would be obliged to ascertain and would have the difficult burden of proving "the facts with respect to the distribution of the specific garments" (R. 312).

The circuit court of appeals reversed the district court's judgment. The court held that maintenance employees "in a loft building such as the one here involved, which is located in the garment district of New York City and which regularly rents factory space for the production of finished articles," is within the coverage of the Act when more than 20 percent of the space in the building is occupied by tenants engaged in the production of goods for interstate commerce. Stating that proof that the tenants at the time of production had "reasonable grounds to anticipate that their products would move in other states" sufficed to constitute them interstate producers, the court concluded that the proof as to 12 additional tenants was sufficient to establish that more than 20 percent of the building was occupied by interstate producers during 1940 and 1941. (R. 325–326.) The releases were held ineffective to bar this action on the ground that "the facts here are exactly the same as those in the *O'Neil* case" (R. 323, 325).

ARGUMENT

I

RESPONDENTS ARE WITHIN THE COVERAGE OF THE FAIR LABOR STANDARDS ACT

We think that the circuit court of appeals correctly held that *Kirschbaum Co.* v. *Walling*, and *Arsenal Building Corp.* v. *Walling*, 316 U. S.

517, and not *10 E. 40th St. Bldg.* v. *Callus*, 325 U. S. 578, are applicable to the facts of this case.

Petitioner's building, like the Arsenal Building, is "located in the heart of the New York City clothing manufacturing district." 316 U. S. at 518. In fact the Schulte building is only about four blocks from the Arsenal building. It is occupied largely by tenants engaged in the same kind of clothing manufacturing processes as those carried on by the tenants in the Arsenal building. The only distinction between the instant case and the *Arsenal* case arises from the fact that, because of the peculiar organization of the dress manufacturing industry, the garments are not sold or distributed by the contractors who manufacture them, and, therefore, the extent of interstate shipment of the particular garments worked on by the tenants in this building is extremely difficult, if not impossible, of specific proof.

This distinction, we submit, is without economic, industrial, or statutory significance. To attach significance to it is to hold the Act applicable to maintenance employees in loft buildings tenanted by manufacturers who ship or distribute their own product but inapplicable to similar employees in loft buildings tenanted by contractors engaged in exactly the same manufacturing processes on goods competing in the same interstate markets. To differentiate on this basis

between maintenance employees in loft buildings "is to make too much turn on the accident of the division of the whole industrial process." See *Callus* decision, 325 U. S. at 581. As this Court pointed out in *United States* v. *Darby*, 312 U. S. 100, 117–118, "Congress was not unaware that * * * it would be practically impossible, without disrupting manufacturing businesses, to restrict the prohibited kind of production to the particular pieces of lumber, cloth, furniture or the like which later move in interstate rather than intrastate commerce," and "the recognized need of drafting a workable statute" requires the conclusion that "the 'production for commerce' intended includes at least production of goods, which, *at the time of production*, the employer, according to the normal course of his business, *intends or expects* to move in interstate commerce although, through the exigencies of the business, all of the goods may not thereafter actually enter interstate commerce." (Italics supplied.) "The Act extends at least to the employer who expects goods to move in interstate commerce." *Warren-Bradshaw Drilling Co.* v. *Hall*, 317 U. S. 88, 92.

The record in this case amply supports the finding of the circuit court of appeals that many of the tenants "at the time of production * * * had at the very least reasonable grounds to anticipate that their products would move in other

states" (R. 326). Its conclusion that this suffices to "constitute them interstate producers" is plainly correct under this Court's decisions in the *Darby* and *Warren-Bradshaw* cases, *supra*. Nor can it be denied that there was "expectation, or a reasonable basis therefor" (*Warren-Bradshaw* decision, p. 92), on petitioner's part that "according to the normal course of his business all or some part [the production of the contractors in petitioner's building] will be selected for shipment" in interstate commerce, *Darby* decision, at 117. "Recognition of the obvious" (cf. *Warren-Bradshaw, supra*, p. 91), requires the conclusion that the lessor of "a loft building * * * which is located in the garment district of New York City and which regularly rents factory space for the production of finished articles" (see circuit court op., R. 325), is not ignorant of such expectation and the basis therefor. As the district court was constrained to observe during the course of the trial, "After all, this is the dress center of the United States. * * * Is there any doubt * * * that the dress contractors know that the wholesalers or dress manufacturers whom they [the contractors] sell to ship dresses all over the United States?" (R. 52).

The evidence in the record with respect to the interstate character of the New York dress manufacturing industry is corroborated by facts of common knowledge and notoriety. In 1939, more

than 70 percent of the dresses manufactured in regular factories in the country and more than two-thirds of the dresses manufactured in contract factories of the country in terms of value of products were produced in New York City. U. S. Census of Manufactures, 1939, Vol. III, pp. 38–39, 724. New York City also produced 72.4 percent of the women's and misses' coats, suits and skirts manufactured in regular factories and 70.6 percent of the women's and misses' coats, skirts and suits manufactured in contract factories. *Id.* at pp. 24–25, 719.[1] No other city produces even as much as 10 percent of the value of production of women's dresses, or coats, suits, and skirts. U. S. Census of Manufactures, 1939, Vol. II, Part I, pp. 432–433, 436–437.

The great bulk of the clothing produced in New York City is shipped to other States. A study of the sales of 97 dress manufacturers for the year 1934, made by the National Recovery Administration, showed that 76.2 percent of the sales were outside New York State. U. S. National Recovery Administration, Division of Review, Evidence Study Series, No. 9, *The Dress Manufacturing Industry*, July 1935, p. 17. Manifestly, this large percent of extrastate sales is a natural conse-

[1] These percentages were computed by dividing the production figures for New York City (pp. 719 and 724) by the figures for total production in the U. S. (pp. 24–25 and pp. 38–39).

quence of the tremendous production beyond the clothing needs of the population of New York State.[5] The women's garment industry in New York City is most heavily concentrated "in the 150 acres bounded by the Pennsylvania Railroad Station on the south, Times Square on the north, Seventh Avenue on the east, and Ninth Avenue on the west." Alderfer, E. B. and Michl, H. E., *Economics of American Industry*, 1942, p. 377. There "in loft buildings are the several thousand small enterprises that comprise the [women's garment] industry; two-thirds of them are of the contractor type," producing, it is estimated, "80 percent of the dresses produced in the New York area." *Ibid.*

[5] In addition, the interstate character of the industry is demonstrated by the number of sales made by manufacturers to retailers. In 1939, 66 percent of all manufacturers' sales of apparel were made to retailers. U. S. Census of Business, 1939, Vol. V, Distribution of Manufacturers' Sales, p. 7. In the women's garment industry the proportion is even higher. Thus, 88.6 percent of the women's dresses, 92.5 percent of the women's blouses and waists, 86.3 percent of the coats, suits and skirts, 74.5 percent of the house dresses, and 75 percent of the other types of women's clothing were sold direct to retailers by the manufacturers in 1939, *id.* at p. 58. Since only a small proportion of the total retail establishments (including department, variety, family clothing, and women's ready-to-wear stores) selling women's clothing are located in New York State (12.1 percent), and in New York City (6.6 percent), it follows that most of these sales were necessarily to establishments located out of the State. (U. S. Census of Business, Vol. I, Retail Trade, 1939, Part I, pp. 63, 264, 268.)

Thus, there can be little doubt that interstate shipment was reasonably to be expected of goods produced in a building located in the New York City dress center and tenanted largely by such contractors. But although the district court, early in the trial, recognized and was impressed by this obvious fact (see *supra*, p. 10) it assumed that in order to establish the coverage of the Act precise proof was required "with respect to the distribution of the specific garments" worked upon by the contractors in petitioner's building (R. 312).[6] A comparison of the testimony relating to the five tenants whom the district court found to be interstate producers with the testimony relating to other tenants shows that the district court regarded as interstate producers only tenants proved to have shipped goods out of the State themselves or tenants who were shown to have worked on specific garments definitely proved to have been shipped out of the State. That the district court was in error in its conception of the degree of proof required is plainly indicated by this Court's decisions in the *Warren-Bradshaw* and *Darby* cases, *supra*.

The *Warren-Bradshaw* case involved a strikingly analogous industrial situation with respect

[6] See also the district court's observation toward the close of the trial: "Let me ask you a question: Every contractor who has been here says he sells outside the City of New York. Who keeps warm and clothes the people who live in New York City?" (R. 241.)

to the oil industry in Texas. It was there argued by petitioner, an operator of rotary drilling equipment, that since the plaintiffs "did not trace the oil produced from the wells worked upon by these plaintiffs" and since there was "no evidence either way as to what became of the oil from these particular wells," "all of the oil produced from the wells could have been used within the State of Texas" (see applt's br. in circuit court of appeals, p. 23; see also petitioner's br. in the S. Ct., p. 11). Petitioner in that case also contended that since he was engaged in drilling oil wells only to a depth short of the oil sand stratum, and was "an independent contractor not financially interested in the wells," it "had no intention, expectation or belief that any oil produced would be shipped in interstate commerce." See 317 U. S. at 92. These contentions were rejected. This Court held that "Assuming that such expectation, or a reasonable basis therefor, was necessary on petitioner's part before the application of the Act to petitioner," there was ample indication in the record "that there were reasonable grounds for petitioner to anticipate, at the time of drilling, that oil produced by the wells drilled, would move into other states." *Id.* at 92. The evidence specifically referred to by this Court did not purport to trace the oil from the particular wells on which the plaintiffs worked, but, like most of the evidence in the instant case, related to the national and inter-

state character of the industry—evidence that (1) "all the wells had pipeline connections, some of them being with petroleum companies operating on a national scale, wherein the oil was commingled with the production of other wells," (2) "that some crude oil is shipped out of the State," (3) "that a large percentage of crude oil sent to refineries in Texas thereafter passes out of the State in the form of refined products," and (4) that considering petitioner's close identification with the business of oil production the evidence in the record afforded "ample indication that there were reasonable grounds for petitioner to anticipate, at the time of drilling, that oil produced by the wells drilled, would move into other states." 317 U. S. at 91–92. None of this evidence undertook to prove interstate movement of oil identifiable as oil derived from the particular wells on which plaintiffs worked.[7]

[7] A like approach to coverage under the Wagner Act was taken by the Circuit Court of Appeals for the Second Circuit in *National Labor Relations Board* v. *Van Deusen*, 138 F. 2d 893. Respondent there operated a "contract shop," processing materials furnished by Tiny Town Togs, Inc., into garments which, after further processing by it, were distributed to its customers. It was stipulated that 80 percent of the cloth used by Tiny Town was purchased outside the State and that 90 percent of its total sales were to out-of-State buyers. Respondent argued that, in view of the small proportion of the total Tiny Town work done by him, it was quite possible for all the raw materials used by him to have come from within the State and for all the garments

There is ample evidence of this same type in the instant case. The contractors in petitioner's building, by the nature of the industry's organization, are connected with manufacturer-jobbers who commingle the production with the production of other contractors and distribute a large proportion of the garments out of the State. And petitioner, as lessor of a loft building in the heart of the garment industry in New York City, is so closely identified with the industry as to be precluded from claiming ignorance of the interstate character of the industry.[8]

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processed by him to have been sold within the State. The court of appeals rejected this argument, Judge Clark saying: "But the stipulation of the parties cannot properly be thus construed. Its reasonable interpretation, as well as the natural assumption from the circumstances—no attempt at separation of the interstate and intrastate elements by Tiny Town being suggested—is that the materials received and garments delivered by respondent, however small a part of Tiny Town's total business, represented the same division of materials received from or delivered without the state as did that total business" (138 F. 2d at 894).

[8] For other decisions under the Fair Labor Standards Act recognizing that if the statute is to be made workable, evidence of this character suffices to establish coverage, see *Dize* v. *Maddrix*, 144 F. 2d 584 (C. C. A. 4); *Culver* v. *Bell & Loffland*, 146 F. 2d 29 (C. C. A. 9); *Walling* v. *Burch*, 8 Wage Hour Rept. 517 (S. D. Ga., 1945); *St. John* v. *Brown*, 38 F. Supp. 385, 388 (N. D. Tex.); *Enterprise Box Co.* v. *Fleming*, 37 F. Supp. 331 (S. D. Fla.), affirmed, 125 F. 2d 897 (C. C. A. 5), certiorari denied, 316 U. S. 704; *Walling* v. *Pine*, 5 Wage Hour Rept. 518 (E. D. Okla., 1942); *Fleming* v. *Hitchcock*, 38 F. Supp. 358, 359 (S. D. Fla.); *Robinson* v. *Larue*, 156 S. W. 2d 359 (Ct. App. Tenn.), affirmed, 156 S. W. 2d 432 (S. Ct. Tenn.). See also *Bracey* v. *Luray*, 138 F. 2d 8 (C. C. A.

There is nothing in this Court's opinion in *10 E. 40th Street Bldg.* v. *Callus* which would require or warrant a conclusion different from that reached by the court of appeals. "An office building exclusively devoted to the purpose of housing all the usual miscellany of offices has many differences in the practical affairs of life from a manufacturing building" (see *Callus* decision, 325 U. S. at 583–584), such as a loft building in the New York City garment center. "And the differences are too important in the setting of the Fair Labor Standards Act not to be recognized by the courts." *Ibid.*, at 584.

We think the circuit court of appeals also correctly ruled that nothing in the *Callus* decision or in any other of this Court's decisions challenges the reasonableness of the Administrator's 20 percent standard (R. 325; see *Baldwin* v. *Emigrant Industrial Savings Bank*, 150 F. 2d 524 (C. C. A. 2),

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4); *Walling* v. *Peoples Packing Co.*, 132 F. 2d 236 (C. C. A. 10), certiorari denied, 318 U. S. 774.

In *Culver* v. *Bell & Loffland*, *supra*, at p. 32, the Ninth Circuit, in holding the Act applicable to employees engaged in drilling dry holes or wells which never in fact produced, said: "Adoption of the trial court's view would render the Act virtually impossible of administration. Overtime compensation is payable in the course of employment and as the work proceeds. *Rigopoulos* v. *Kervan*, Second Circuit, 140 F. (2d) 506. Under the test applied below, if the hole drilled eventually becomes productive the employee's work is covered; otherwise it is not. Neither the employer nor the employee could know until after the event perhaps until long after the relationship is severed, whether the Act applied to the relationship."

certiorari denied November 13, 1945).* This standard was adopted not as the Administrator's official interpretation of the Act, but for enforcement purposes and pending clarification by the courts. The selection of the 20 percent standard proceeds on the working hypothesis that when as much as 20 percent of a building is occupied by firms substantially engaged in production for commerce, then the amount of work of the maintenance employees which is related to and necessary to such production will almost unavoidably be large enough to meet the test of substantiality developed and applied by the courts. The 20 percent standard represents, of course, no more than a statement of the Administrator's enforcement policy publicly announced for the convenience of building operators everywhere, but we submit that the working hypothesis which it adopts rests upon a rational basis.

While evidence was not offered with respect to all of the tenants in the building, proof was pre-

* The 20 percent standard is an administrative rule of thumb adopted for enforcement purposes with respect to building maintenance employees. "In view of recent decisions of the courts in employee suits brought by maintenance employees in office and bank buildings" the Administrator has announced that he would take "no further enforcement action * * * with respect to maintenance employees in buildings in which less than 20 percent of the space is occupied by firms engaged there or elsewhere in the production of goods for commerce." See Release PR-19 (Rev.), issued by the Wage Hour Division, U. S. Dept. of Labor, Nov. 19, 1943.

sented with respect to a sufficient number of them to prove that more than 20 percent of the space was occupied by interstate producers. Since it seems undisputed that "the tenants of the building were largely contractors" who performed labor for New York garment manufacturers (R. 310, 274–275, 325), it does not seem unreasonable to assume, despite the absence of specific proof, that a great deal more than 20 percent of the building was occupied by interstate producers. In any event, we submit that the evidence in the record is amply adequate to bring this case within the scope of the *Kirschbaum* and *Arsenal* cases.

II

RESPONDENTS' RELEASES HERE WERE NOT IN SETTLEMENT OF A BONA FIDE DISPUTE AND ARE CONSEQUENTLY INEFFECTIVE TO BAR THIS ACTION

We think the court of appeals also correctly ruled that there was no more bona fide dispute between the parties here than there was in *Brooklyn Savings Bank* v. *O'Neil*, 324 U. S. 697. As in the *Brooklyn Savings* case, "viewed most favorably [for petitioner] * * * [the] testimony was merely to the effect that the petitioner had subjective doubts as to the existence * * * of its liability." *Id.* at 704n. Also, as in the *Brooklyn Savings* case, "there was no discussion or dispute * * * either as to the existence of liability under the Act or as to the amount of such liability" (*id.* at 703–704n), except a mere state-

ment by petitioner's representative expressing uncertainty as to the applicability of the *Kirschbaum* decision. This statement is entitled to no more weight than "the recital in the release" in the *Brooklyn Savings* case (p. 703) that "there is uncertainty as to whether the undersigned has an enforceable claim" (*Brooklyn Savings* record, R. 11). The *Brooklyn Savings* decision makes it plain that subjective doubts, together with a mere expression of uncertainty, do not constitute a *bona fide* dispute.

In this case, as in the *Brooklyn Savings* case, "petitioner undertook to pay the respondent after [the] decision in *Kirschbaum Co.* v. *Walling* * * * which determined the applicability of the Fair Labor Standards Act to building operators like the petitioner" (*id.* at p. 703).[10] Although, as the circuit court of appeals observed, petitioner here "may have been more vociferous in its assertion that its business is local" (R. 325), there was

[10] The court of appeals was of the view that the "use of a disagreement as to the legal interpretation of the Act, turning upon the nature of the employer's business," as a basis for a settlement "appears definitely prohibited by the *O'Neil* case" (R. 325). Dodd, in *Administration of Workmen's Compensation*, p. 186, *et seq.*, appears to support the distinction suggested by the court of appeals between (1) disputes going to the existence of any right and (2) disputes respecting only the amount due. There was no controversy whatsoever in the instant case as to the amount due, inasmuch as the amounts were computed by petitioner and accepted by respondents (R. 285–286).

no more, and perhaps even less, justification for such assertion in the instant case. The *Kirschbaum* and *Arsenal* decisions are, in many respects, even more clearly determinative of the issue of coverage here than in the *Brooklyn Savings* case. For, as noted above, the building here is a loft building virtually identical with the loft building involved in the *Arsenal* case, located in the same garment manufacturing district and devoted to almost identical manufacturing processes; whereas the building in the *Brooklyn Savings* case was located in a business district where a miscellany of businesses is carried on, and was rented to a variety of tenants under leases containing covenants against manufacturing (*Brooklyn Savings* record, R. 56–57).[11]

The district court's conclusion that there was a "genuine dispute" with respect to coverage here was, as we have shown in Point I, *supra,* predicated on its erroneous assumption with respect to the required degree of proof of interstate commerce. The district court may well have concluded otherwise had it realized that respondent's burden of proof was not so difficult as to give color to petitioner's denial of liability.

[11] The record in that case showed that, despite these covenants, substantial manufacturing was carried on in the building (see Government's brief amicus in the *Brooklyn Savings* case, p. 4, n. 1). However, there were also many nonmanufacturing tenants in the building (see, e. g., *Brooklyn Savings* record, 34–41, 44–45).

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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FEBRUARY 1946.

U. S. GOVERNMENT PRINTING OFFICE: 1946

p. 2. dissent

SUPREME COURT OF THE UNITED STATES.

No. 517.—October Term, 1945.

D. A. Schulte, Inc., Petitioner,
vs.
Salvatore Gangi, suing on behalf of himself and other employees similarly situated.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[April 29, 1946.]

Mr. Justice Reed delivered the opinion of the Court.

The issues brought to this Court by this proceeding arise from a controversy concerning overtime pay and liquidated damages under the Fair Labor Standards Act of 1938. Under Section 7(a), the employer is required to pay for excess hours of work not less than one and one-half times the regular rate.[1] An employer who violates this subsection is liable to his injured employees in the amount due and unpaid and in an additional equal amount as liquidated damages.[2]

The primary issue presented by the petition for certiorari is whether the Fair Labor Standards Act precludes a bona fide settlement of a bona fide dispute over the coverage of the Act on a claim for overtime compensation and liquidated damages where

[1] 52 Stat. 1063:

"Sec. 7. (a) No employer shall . . . employ any of his employees who is engaged in commerce or in the production of goods for commerce . . . for a longer than the maximum workweek]

unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed."

[2] 52 Stat. 1069:

"Sec. 16. (b) Any employer who violates the provisions of section 6 or section 7 of this Act shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Action to recover such liability may be maintained in any court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated, or such employee or employees may designate an agent or representative to maintain such action for and in behalf of all employees similarly situated. The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action."

the employees receive the overtime compensation in full. As the conclusion of the Circuit Court of Appeals on this issue in this case[3] conflicts with that of the Fourth Circuit in *Guess* v. *Montague*, 140 F. 2d 500, 504-505, and the Fifth Circuit in *Atlantic Co.* v. *Broughton*, 146 F. 2d 480, we granted certiorari in order to determine the issue which was not passed upon in *Brooklyn Bank* v. *O'Neil*, 324 U. S. 697, 702-704, 708, note 21. — U. S. —.[4]

Respondents were employed by petitioner as building service and maintenance employees in its twenty-three story loft building in the garment manufacturing district of New York City during the period October 24, 1938, to February 5, 1942. Each put in varying hours of overtime for which no payment had been made prior to our decision in *Kirschbaum* v. *Walling*, 316 U. S. 517, on June 1, 1942, by which service and maintenance employees in buildings tenanted by manufacturers producing for interstate commerce were held to be covered by the Wage-Hour Act. Shortly thereafter respondents made claims for overtime pay and liquidated damages which were refused by petitioner on the ground admittedly true that its tenants did not ship the products they produced directly in interstate commerce but delivered them to distributors or producers in the same state who thereafter used the products of petitioner's tenants for interstate commerce or the production of goods for that commerce. Under threat of suit, petitioner paid the overtime compensation and obtained a release under seal signed by the several respondents. It is set out below.[5] Petitioner computed the amount of overtime and re-

[3] Gangi v. D. A. Schulte, 150 F. 2d 694. See also Fleming v. Warshawsky & Co., 123 F. 2d 622, 626.

[4] In view of the number of settlements for violations, the issue is of importance. See Annual Report, Wage and Hour and Public Contracts Divisions, U. S. Department of Labor, fiscal year ending June 30, 1945, p. 2: "In the six years and nine months that the Fair Labor Standards Act had been in force through the end of the fiscal year, about $85,000,000 in restitution of illegally withheld wages had been agreed to or ordered paid to almost two and a half million workers in more than 110,000 establishments, with more than two-fifths of the cases involving failure to pay the minimum wage of 40 cents an hour or less."

[5] "The undersigned, an employee of D. A. Schulte, Inc., in premises 575 Eighth Avenue, New York City, does hereby acknowledge receipt of the sum of $..... as payment in full of all sums, if any, which may be due to the undersigned by said D. A. Schulte, Inc. by reason of the Federal Wage & Hour Act, and the undersigned does hereby release said D. A. Schulte, Inc. of and from any other or further obligations in connection therewith."

spondents raise no question as to its accuracy. Respondents then brought this suit in the district court to recover liquidated damages due them under Section 16(b) of the Act. It was stipulated that the liquidated damages, due if recoverable, were certain stated amounts which corresponded to the overtime compensation already paid. Petitioner denied that it was covered by the Act and pleaded affirmatively, as a defense, the releases which it asserted were obtained in settlement of a bona fide dispute as to coverage.

The District Court held that there was a good accord and satisfaction and release of all claims for liquidated damages because there was a bona fide settlement of a bona fide dispute. It specifically refused to pass upon the defense that the Act did not cover the respondents except to indicate that it presented a difficult issue. 53 F. Supp. 844. This judgment was entered prior to our decision in the *O'Neil* case. The Circuit Court of Appeals reversed. That court thought the *O'Neil* case substantially determined that a bona fide compromise of a dispute as to coverage was invalid. Its conclusion as to the invalidity of such compromises was in accord with its prior comments that the liability of unpaid overtime compensation and liquidated damages is single and "is not discharged in toto by paying one-half of it." *Rigopoulos* v. *Kervan*, 140 F. 2d 506, 507; *Fleming* v. *Post*, 146 F. 2d 441, 443.

Petitioner urges that the theory of a single liability of the employer to the employee under Sec. 16(b) is unsound and that this Court should not find a lack of power in employers and employees to settle amicably controversies over coverage and amounts due for violations of the unpaid minimum wage or unpaid overtime compensation under Sections 6 and 7 of the Act. Petitioner reasons on its first contention that there were two claims—one for overtime compensation and the other for an equal amount as liquidated damages—and that the payment for the first in full was sufficient consideration for the release of the second. On its second contention, petitioner advances the argument that since the Congressional intent to forbid compromises of such claims is not clear, such a sharp departure from the traditional policy of encouraging the adjustment instead of the litigation of disputes cannot be inferred from the purposes

of the Act. Petitioner points out that a seaman may release his claims under statutes enacted for his protection in a bona fide settlement[6] and that settlement of accrued claims is permitted under the Federal Employers' Liability Act.[7] Petitioner adds that in doubtful cases it may be advantageous to the employee to compromise, that to force litigation may disrupt employer-employee relationships, and that numerous compromise settlements have been made for less than full liability.[8]

We do not find it necessary to determine whether the liability for unpaid wages and liquidated damages that Section 16 (b) creates is unitary or divisible.[9] Whether the liability is single or dual, we think the remedy of liquidated damages cannot be

[6] Garrett v. Moore-McCormack Co., 317 U. S. 239.

[7] Mellon v. Goodyear, 277 U. S. 335.

[8] Attention is called by petitioner to the failure in this case of the Administrator of the Wage and Hour Division, United States Department of Labor, as Amicus Curiae, to take the position that compromise payments in cases of disputed coverage are invalid. The Administrator is charged with responsibility for the administration of the Act. Petitioner cites from the Administrator's brief (p 29) in the *O'Neil* case to show the Government position the following excerpt: "The factors which we have mentioned suggest, to us, the difficulty and perhaps the inadvisability from the standpoint of the policy of the Act of framing a sweeping generalization that all releases of liquidated damages are either valid or invalid." That brief called attention also (pp. 19-20) to Government practice upon violations of the Act by contractors with cost-plus contracts with the War and Navy Departments:

"If it is decided by the contracting agency, the Administrator, or on appeal by the Assistant Attorney General, that the employee should prevail, the United States Attorney handling the case is directed to negotiate a tentative settlement with the employee's counsel for submission to the contracting agency for acceptance or rejection. The wages due are of course always paid, but the claim for liquidated damages is the subject of bargaining, and almost invariably the employee's counsel is willing to accept considerably less than the total amount of liquidated damages. After payment of the amount agreed on, a judgment is entered dismissing the suit with prejudice, thereby preventing the employee from seeking to recover more on the same claim."

Settlements of controversies under the Act by stipulated judgments in this Court are also referred to by petitioner. North Shore Corporation v. Barnett et al., 323 U. S. 679.

Petitioner draws the inference that bona fide stipulated judgments on alleged Wage-Hour violations for less than the amounts actually due stand in no better position than bona fide settlements. Even though stipulated judgments may be obtained, where settlements are proposed in controversies between employers and employees over violations of the Act, by the simple device of filing suits and entering agreed judgments, we think the requirement of pleading the issues and submitting the judgment to judicial scrutiny may differentiate stipulated judgments from compromises by the parties. At any rate the suggestion of petitioner is argumentative only as no judgment was entered in this case.

[9] See Dize v. Maddrix, 324 U. S. 697, 701-2, 713.

bargained away by bona fide settlements of disputes over coverage. Nor do we need to consider here the possibility of compromises in other situations which may arise, such as a dispute over the number of hours worked or the regular rate of employment.[10]

The reasons which lead us to conclude that compromises of real disputes over coverage which do not require the payment in full of unpaid wages and liquidated damages do not differ greatly from those which led us to condemn the waivers of liquidated damages in the *O'Neil* case. We said there, 324 U. S. at 708:

> "The same policy which forbids waiver of the statutory minimum as necessary to the free flow of commerce requires that reparations to restore damage done by such failure to pay on time must be made to accomplish Congressional purposes. Moreover, the same policy which forbids employee waiver of the minimum statutory rate because of inequality of bargaining power, prohibits these same employees from bargaining with their employer in determining whether so little damage was suffered that waiver of liquidated damage is called for."

In a bona fide adjustment on coverage, there are the same threats to the public purposes of the Wage-Hour Act that exist when the liquidated damages are waived. The damages are at the same time compensatory and an aid to enforcement. It is quite true that the liquidated damage provision acts harshly upon employers whose violations are not deliberate but arise from uncertainties or mistakes as to coverage. Since the possibility of violations inheres in every instance of employment that is covered by the Act, Congress evidently felt it should not provide for variable compensation to fit the degree of blame in each infraction.[11] Instead Congress adopted a mandatory requirement that the employer pay a sum in liquidated damages equal to the unpaid wages so as to compensate the injured employee for the retention of his pay.[12]

It is realized that this conclusion puts the employer and his employees to an "all or nothing gamble," as Judge Chase phrased

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[10] See Strand v. Garden Valley Telephone Co., 51 F. Supp. 898, 904-5.

[11] Brooklyn Savings Bank v. O'Neil, *supra*, 713; West Coast Hotel Co. v. Parrish, 300 U. S. 379, 397; Adkins v. Children's Hospital, 261 U. S. 525, 563.

[12] Overnight Motor Co. v. Missel, 316 U. S. 572, 583-84; Birbalas v. Cuneo Printing Industries, 140 F. 2d 826, 828-29.

the result in his dissent below. Theoretically this means each party gets his just deserts, no more, no less. The alternative is to find in the Act an intention of Congress to leave the adjustments to bargaining at the worst between employers and individual employees or at best between employers and the employees' chosen representatives, bargaining agent or some other. We think the purpose of the Act, which we repeat from the *O'Neil* case was to secure for the lowest paid segment of the nation's workers a subsistence wage, leads to the conclusion that neither wages nor the damages for withholding them are capable of reduction by compromise of controversies over coverage.[13] Such a compromise thwarts the public policy of minimum wages, promptly paid, embodied in the Wage-Hour Act, by reducing the sum selected by Congress as proper compensation for withholding wages.[14]

The only other material question presented by this certiorari[15] is whether the Wage-Hour Act covers service and maintenance employees of a building that is tenanted by occupants who receive, work on and return in intrastate commerce goods belonging to non-occupants who subsequently in the regular course of their business ship substantial proportions of the occupants' products to other states.[16] It is agreed by petitioner and respon-

[13] Discussions of compromise of liability under the Wage-Hour Act will be found in 45 Col. L. Rev. 798; 14 George Washington L. Rev. 385 and 57 Harv. L. Rev. 257.

[14] Brooklyn Savings Bank v. O'Neil, *supra*, 704-5, note 14.

[15] The precise language of the question presented is as follows:

"Whether building maintenance employees are within the protection of the Act if the facts relied on to establish coverage of the employees show only that some of the tenants in the building receive, work on and return in intrastate commerce goods belonging to local owners who are not tenants of the building and that subsequently some of the said goods are sold and shipped by such non-tenant owners in interstate commerce, there being no proof either that at the time of production such tenants had any knowledge of the ultimate destination of the goods worked on by them or that at the time of production the non-tenant owners had any prior orders or agreements to sell and ship any part of the completed goods in interstate commerce."

[16] No problem involving the soundness of the Wage-Hour standards to guide its enforcement of the Act is involved. We express no opinion on that question. As a working hypothesis the Wage-Hour Administration assumes that when as much as twenty per cent of a building is occupied by firms substantially engaged in production for commerce, then it is likely that maintenance employees will be covered. Release PR-19 (rev.), Nov. 19, 1943, Wage-Hour Division, U. S. Depart. of Labor. The Circuit Court of Appeals applied this rule with the result that it decided none of the respondents was covered by the Act prior to January 1, 1940. 150 F. 2d 694, 696-97. It decided that all the respondents were covered by the Act beginning Janu-

dents that if certain tenants are included as producers for interstate commerce the occupants of the building who are engaged in production for interstate commerce are sufficiently numerous and productive to bring the maintenance employees of the building within the coverage of the Act. *Gangi* v. *D. A. Schulte*, 150 F. 2d 694, note 5. That is, petitioner's building then would be in the same classification, so far as the coverage of its maintenance employees by the Wage-Hour Act is concerned, as were the buildings in *Kirschbaum* v. *Walling*, 316 U. S. 517, and *Borden Company* v. *Borella*, 325 U. S. 679. We then would have no problem as to the business of the tenants, that is, whether they were producers for interstate commerce, such as was involved in *10 East 40th Street Co.* v. *Callus*, 325 U. S. 578. While the Wage-Hour Act covers employees engaged in the production of goods for commerce, a maintenance employee working for a building corporation which furnishes loft space to tenants can hardly be so engaged unless an adequate proportion of the tenants of that building are so engaged. *Kirschbaum Co.* v. *Walling*, 316 U. S. at 524; *Walling* v. *Jacksonville Paper Co.*, 317 U. S. 564, 572.

Our inquiry, therefore, is narrowed to a determination of whether or not these certain tenants of petitioner, twelve in number, are producing goods for interstate commerce. These tenants manufactured articles for non-tenant New York City business organizations which organizations subsequently sold the articles in interstate commerce. The Circuit Court of Appeals held as to them, 150 F. 2d 697:[17]

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ary 1, 1940, because more than twenty per cent of the tenants then were engaged in the production of goods for commerce. No review of the first ruling is sought by respondents. Petitioner did not question the soundness of the twenty per cent standard in its petition for certiorari or brief.

As no question is made in petition for certiorari or brief as to the propriety of the action or the power of the Circuit Court of Appeals in determining the kind of activity, state or interstate, that the petitioner's tenants carried on, rather than returning the case to the District Court for a finding of fact, we pass the question without inquiry and without intimation of our understanding of the proper procedure. Compare the majority and dissenting opinion in 150 F. 2d 694.

[17] Petitioner says as to this finding: "The sole basis in the record for this finding is that the manufacturers for whom the said twelve tenant-contractors worked eventually disposed of some of their goods in interstate commerce. No evidence was offered and no attempt was made to prove that at the time when any of the additional twelve tenants worked on goods belonging to the manufacturers, such manufacturers had an order or an agreement or contract for the shipment of the goods, when completed, in interstate commerce. There was no testimony by any of the twelve tenants that they knew or had reason to believe that the goods worked on by them would be shipped in interstate commerce. In fact, there was no evidence, in the case

"And the testimony clearly shows that at the time of production these tenants had at the very least reasonable grounds to anticipate that their products would move in other states. This is all that had to be shown to constitute them interstate producers. *Warren-Bradshaw Drilling Co. v. Hall*, 317 U. S. 88, 92; *United States v. Darby*, 312 U. S. 100, 118. . . .

Petitioner asserts that for four of the twelve there was no evidence that any of them knew at the time of production or later that their products were to be shipped interstate and that the proper characterization of these four tenants, as producers or non-producers for interstate commerce, is decisive of the liability of petitioner. Without detailing the factual situation which makes the position of these four tenants decisive of liability, we assume petitioner's conclusion that its liability depends upon the proper characterization of the four tenants in respect to their position as producers for interstate commerce. We assume that the other eight are in the same category of tenants.

Petitioner relies upon *Walling v. Jacksonville Paper Co.*, 317 U. S. 564, 569, as indicating that evidence of a pre-existing understanding, by a manufacturer of the interstate destination of his products is essential. But that case was concerned with whether a wholesaler's employees who handled stock were in commerce, not whether they were engaged in the production of goods for commerce.[18] On that basis distinctions were made, as to employees handling goods locally, between a wholesaler's stock purchased on prior order extra-state for delivery intrastate and other stock purchased extra-state and warehoused for subsequent sale and local handling. We find nothing in the case that lends any support to the suggestion that a manufacturer's intrastate delivery to a wholesaler or distributor or other manufacturer for further processing for ultimate interstate distribution interrupts production for interstate commerce.

The burden of proof that rests upon employees to establish that they are engaged in the production of goods for commerce must be met by evidence in the record. *Warren-Bradshaw Drilling Co. v. Hall*, 317 U. S. 88, 90. The record shows this building is at 571-583 Eighth Avenue, Borough of Manhattan, City of New York. The testimony of many witnesses shows that the

of four of the twelve tenants, that any of them knew, either at the time of production or at any time thereafter, or even upon the trial, that the goods worked on by them were eventually shipped in interstate commerce."

[18] Compare McLeod v. Threlkeld, 319 U. S. 491.

tenants were predominantly, if not entirely, engaged in work for the garment trades. We will take judicial notice, as a matter of common knowledge, that New York City produces more garments for interstate shipment than any other city in the Nation. Eleven of the twelve tenants were contractors who furnished labor on goods sent in to them so as to produce clothing articles eventually distributed in interstate commerce. The twelfth was a manufacturer with offices, salesroom and shipping rooms elsewhere in New York. There was no specific evidence that the four contractors, upon whose status petitioner based his argument, ever knew that their goods were intended to be or eventually were *shipped* interstate. There is clear evidence that each business organization for which these four tenants did produce these clothing articles shipped a major proportion of the articles so produced by these tenants in interstate commerce in the regular course of their business. The production of these articles by the tenants for non-tenants was the regular business of the tenants. The shortest occupancy of space by any of the four was five years and eleven months.

From these facts, we think the conclusion of the Circuit Court of Appeals that these tenants had reasonable grounds to anticipate that material quantities of their production would move interstate is well supported. It is not essential that individual products should be traced. It is sufficient that from the circumstances of production, a trier of fact may reasonably infer that a producer has grounds to anticipate that his products will move interstate.[19] Certainly if these tenants had not only manufactured but had also shipped their products interstate, no one would doubt that they were producers for commerce. Mere separation of the economic processes of production for commerce between different industrial units, even without any degree of common ownership does not destroy the continuity of production for commerce. Producers may be held to know the usual routes for distribution of their products. All this is made plain by the citations of the Court of Appeals to the *Darby* and *Bradshaw* cases.

Affirmed.

Mr. Justice JACKSON took no part in the consideration or decision of this case.

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[19] Compare Dize v. Maddrix, 144 F. 2d 584; Culver v. Bell & Loffland, 143 F. 2d 29; St. John v. Brown, 38 F. Supp. 385, 388; Fleming v. Enterprise Box Co., 37 F. Supp. 331, aff'd 125 F. 2d 897; Bracey v. Luray, 138 F. 2d 8.

SUPREME COURT OF THE UNITED STATES.

No. 517.—October Term, 1945.

D. A. Schulte, Inc., Petitioner,
vs.
Salvatore Gangi, Suing on Behalf of Himself and other Employees similarly situated.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[April 29, 1946.

Mr. Justice Frankfurter, with whom Mr. Justice Burton concurs, dissenting.

Substantially for the reasons given by Judge Rifkind, 53 F. Supp. 844, I would restore his judgment in the District Court and reverse that of the Circuit Court of Appeals. For purposes of judicial enforcement, the "policy" of a statute should be drawn out of its terms, as nourished by their proper environment, and not, like nitrogen, out of the air. Before a hitherto familiar and socially desirable practice is outlawed, where overreaching or exploitation is not inherent in the situation, the outlawry should come from Congress. To that end, some responsibility at least for a broad hint to the courts, if not for explicitness, should be left with Congress.

When on other occasions Congress has desired to forbid arrangements made in good faith, it has known how to express its will. When it has not said so in words, it has said so in effect by the very thing it has required, as, for instance, when it made tariffs filed with the Interstate Commerce Commission the fixed measure of transportation charges and forbade discrimination. 24 Stat. 379, 380, as amended; 49 U. S. C. §6 7th. Of course that precludes discrimination by contract. *E. g., Pittsburgh, &c. Ry. Co.* v. *Fink*, 250 U. S. 577. The Fair Labor Standards Act affords no comparable basis for the Court's decision in this case. Nothing is discernible in anything that Congress has said or done to imply the prohibition of a settlement made by parties in good faith, not for the minimum wages but a settlement affecting the penalizing double liability where any liability was fairly in controversy when the settlement was made. The severity of the penalties imposed and the legitimate differences regarding the

scope of the Act, inherent in its terms, *cf. Kirschbaum* v. *Walling*, 316 U. S. 517, 520, 523, only serve to underline the impolicy of attributing to Congress a purpose reflected neither in any specific provision of the statute nor in the scheme of the legislation. Strict enforcement of the policy which puts beyond the pale of private arrangement minimum standards of wages and hours fixed by law does not call for disregard of another policy, that of encouraging amicable settlement of honest differences between men dealing at arm's length with one another.

~~The late CHIEF JUSTICE participated in the hearing and disposition of this case and had joined in this dissent.~~